Supreme Court, U.S.
FILED
061239 FEB 12 2007
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Rad W. Hamilton

Petitioner,

v.

Enterprise Leasing Company of St. Louis

Respondent,

On Petition For A Writ of Certiorari
Appeal from the Eighth Circuit Court
Honorable Circuit Judges, Murphy, Bye, and Melloy

PETITION FOR A WRIT OF CERTIORARI

Rad W. Hamilton, Pro se
1353 Nykiel Court
Manchester, Missouri 63011
314-378-0790

QUESTIONS PRESENTED

Who we are, what we do and why it matters? The Justice's of The Supreme Court are our Schoolrooms. Everything that comes from the Justice's schoolrooms is designed to lecture and teach what matters most to the workers of our Country. Justice! With the Supreme Court's June 23, 2006, 9-0 ruling that strengthens the enforcement of the Civil Rights Act of 1964, Petitioner respectfully requests this case be heard for the benefit of all workers who file discrimination complaints and should not be punished by their employer. The question presented is can a case like this, filed against Enterprise Leasing Company of St. Louis, a fortune 100 Company retaliate against a 56 year old worker. Discrimination and Retaliation! What are they and why do employers like Enterprise Leasing Company of St. Louis, a fortune 100 Company, in Corporate America escape the laws of the Supreme Court of the United States when such laws are there to protect the employees from discriminatory acts of age, retaliation, and labeling such intended discriminatory comments as "stray remarks" by employers?

Petitioner has made continued references to the actions of Enterprise Leasing Company of St. Louis regarding Petitioner's forced resignation on March 3, 2004. Enterprise Leasing Company of St. Louis pre-planned this forced resignation with a five (5) page prepared Separation Agreement and Release document on the morning of March 2, 2004 (see APPENDIX D page 72) where Enterprise offered Petitioner Four Thousand Sixty ($4,060.00) to leave Enterprise in exchange for Petitioner to expressly waive any and all rights or claims arising under the Age Discrimination in Employment Act of

1967 (the "ADEA") see paragraph No. 8 especially subparagraph No. (d) which states, "Rad W. Hamilton acknowledges that the waiver of his rights or claims arising under the ADEA is in exchange for the consideration payable to him under this Agreement, which is **substantially** above and beyond that to which he is otherwise entitled except for this Agreement. This document alone reinforces Petitioners claims of retaliation and forced resignation and the length to which Enterprise Leasing Company of St. Louis will go to keep this case out of court! This Separation Agreement and Release is their way to force any employee to resign solely in the name of $4,000.00 and waive their rights without recourse and keep discrimination cases like this out of the Courts jurisdiction.

In direct conflict with the decision of the Supreme Court of the United States, the District Court and the Eighth Circuit both denied the Petitioners pending motion without giving any credence to this Court's 9-0 ruling that strengthened the enforcement of the Civil Rights Act of 1964 that employers may not punish workers who file discrimination complaints by shifting them to a less appealing job.

The question is..."what is a stray remark?" Both the District Court and the Eighth Circuit thinks a "stray remark" hinges on the statement by Keith Hoeferling... "he is to old and to slow." Perhaps that qualifies for a court determined, issue of being a stray remark. I don't think so, but examine the real remark as stated by Keith Hoeferlin! That remark in its entirety can be found on the Charge Questionnaire page 67 of this petition. The real remark is directly quoted as, **"your to old and too slow," Matt is young and I've seen him whip through the**

extensions and claims so fast!" This correct remark was furnished to the EEOC and made available to the District Court and the Eight Circuit. The question is, does a "sentence with 21 words constitute a "stray remark?" How can the District Court and the Eight Circuit call a 21 worded sentence a "stray remark?" Isn't that a well thought out sentence as opposed to a stray remark?

The two questions presented is why the Supreme Court's new 9-0 ruling of the Civil Rights Act of 1964 and the lower courts' interpretation of a sentence as a "stray remark" were not given the proper consideration when it's clear that Enterprise Leasing Company of St. Louis retaliated against Petitioner for 4 years for complaining that Petitioner was told by his decision making supervisor that, "he is to old and to slow" which was definitely not a "stray remark!" In direct conflict with decisions from other circuits and the Eighth Circuit on ruling in 2000 in which they stated, ("In remanding for trial, we emphasize the oft repeated phrase that summary judgment should seldom be granted in discrimination cases.") Basset v. City of Minneapolis, 211F.3d 1097 (8th Cir.2000).

Certiorari is warranted to restore the reasonable limitations that Congress and the Supreme Court imposed on the **scope of retaliation** and the circuit's opinions on **granting summary judgment** to resolve the lower courts' uncertainty regarding the statute's parameters.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned Pro se states that Enterprise Leasing Company of St. Louis is a wholly owned company. No other publicly held company owns any of Enterprise Leasing Company of St. Louis' stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i
PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT.....ii
TABLE OF AUTHORITIES vii
OPINIONS BELOW.....1
JURISDICTION.....1
STATEMENT OF ISSUES.....1
REASON FOR GRANTING THE PETITION.....28

I. The Decision Below Conflicts With Decision From The Supreme Court Upheld The Civil Rights Act Of 1964 That Made It Illegal For Employers To Retaliate Against Employees who Complain Of Discrimination.....2

II. The Decision Below Conflicts With Decisions From The Fifth, Seventh, Eighth And Eleventh Circuits That Allows section 1981 retaliation claims to proceed without exhaustion of Title VII administrative remedies; When Cases Of Summary Judgment And Intent Are Crucial Issues We Review With Heightened Scrutiny; Summary Judgment Should Seldom Be Granted In Discrimination Cases; District Courts Should Exercise Caution In Granting Summary Judgment When Such Cases Involve Motive and Intent, Respectively.....2 & 3

CONCLUSION.....29

PETITION.....1 - 30

page(s)

APPENDIX A: Opinion of the United States District Court Eastern District of Missouri.....31

Pages 31 through 57 (25 pages)

APPENDIX B: Opinion of the United States Court of Appeals for the Eighth Circuit.....58

Page 58 through 63 (6 pages)

APPENDIX C: EEOC Charge Questionnaire.....64

Page 64 through 71 (8 pages)

APPENDIX D: Separation Agreement and Release.....72

Pages 72 through 79 (8 pages)

TABLE OF AUTHORITIES

Page(s)

CASES

Webb v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991, 997 (7th Cir. 2000).....11

Talanda v. KFC Nat. Management Co., 140F.3d 1090, 1095 (7th Cir.1998).....2, 11

Bassett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000)...iii,2,11, 24,25

Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998.....3, 11

Thompson v. Orange Lake county Club, Inc., 224 F. Supp. 2d 1368, 1372 (M.D.Fla. 2002)..... ...2, 12

Coleman v. Holiday Inn Select, 158 F. Supp.2d 923, 927-928 (E.D. Ark 2001).....2, 12

Stutler v. Illinois Dep't of Corrections, 263 F.3d 698, (7th Cir. 2001).....13

The Supreme Court in Burlington Industries, v. Ellerth, 524 U.S. 742, 118.Ct. 2257 (1998).....14

Faragher v. City of Boca Raton, 524 U.S. 775. 118, S.Ct. 2275 (1998).....14

TABLE OF AUTHORITIES

Page(s)

CASES (cont'd)

See Ellerth, 524 U.S. at 760 and 764,
118 S.Ct. at 2268, and 2270;
Faragher, 524 U.S. at 789,
803, 808, 118 S.Ct. 2284,
2291, and 2293.....14

Price Waterhouse v. Hopkins,
49 U.S. 228, 109 S.Ct. 1775
(1998).....3, 15

Oest v. Illinois Dep't of Corrections,
240 F.3d 605, 612
(7th Cir. 2001).....19

Desert Palace, Inc. v. Costa,
539 U.S. 90, 123 S.Ct. 2148
(2003).....24

Supreme Court Ruling
Civil Rights Act of 1964
(June 23, 2006).....2

Caldwell v. National Brewing Co.,
443 F.2d 1044, 1066
(5th Cir. 1971).....3

STATUTES

28 U.S.C. 1331.....1
42 U.S.C. 1981.....1

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at (8th Cir. R. 47B. The order denying Petitioner's petition for a "remand for trial" is unreported. The opinion of the United States District Court for the Eastern District of Missouri is unpublished.

JURISDICTION

The District Court had jurisdiction over respondent's claims pursuant to 28 U.S.C. 1331.The District Court entered its Judgment and Order granting summary judgment on October 17, 2006.

The Eighth Circuit Court of Appeals filed its opinion on January 10, 2007 denying the Petitioner's motion for "remand for trial" See 8th Cir. R. 47B.

STATEMENT OF ISSUES

This case raises several issues of exceptional importance to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 involving the Supreme Court of the United States' NEW 9-0 decision that strengthens the enforcement of civil rights laws in the workplace by ruling that employers may not punish workers who file discrimination complaints by shifting them to a less

appealing job. Petitioner checked off the "retaliation" box on the charge questionnaire (see Appendix B).

I. **On or about June 23, 2006 the Supreme Court in a 9-0 ruling upheld the Civil Rights act of 1964 that made it illegal for employers to retaliate against employees who complain of discrimination.**

II. **The Seventh Circuit Court in 1998 stated ("When the case before us is a summary judgment and intent are crucial issues, we review the record with heightened scrutiny.") Talanda v. KFC Nat Management Co., 140 F.3d 1090, 1095 (7th Cir. 1998)**

III. **The Eighth Circuit Court in 2000 stated("In remanding for trial, we emphasize the oft repeated phrase that summary judgment should seldom be granted in discrimination cases.") Basset v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000)**

IV. **The Eleventh Circuit Court in 2002 stated, ("In cases where employment discrimination has been alleged district courts should exercise caution in granting summary judgment because such cases usually involve the examination of motive and intent.") Thompson v. Orange Lake Country Club, Inc., 224 F. Supp. 2d 1368, 1372 (M.D. Fla. 2002)**

V. **Coleman v. Holiday Inn Select, 158 F.Supp.2d923-928 (E.D. Ark 2001) state, "Given the fact that discrimination cases most often rest upon inferences rather than**

direct evidence, summary judgment should not be granted unless the evidence could not support any "reasonable" inference for the nonmovant and 'summary judgment should seldom be used in employment cases.)

VI. Justice Sandra Day O'Connor in her concurring opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 109, S.Ct. 1775 (1998) stated, "discriminatory workplace comments could be used as direct evidence of discriminatory animus if the decisions were made by the decisions-makers in the context related to the decisional process..." thus the remark by Mr. Hoeferlin was Petitioners immediate supervisor and decision maker!

VII. The First Circuit in 1998 stated, ("Where a Plaintiff in a discrimination cases makes out a prima facie case and the issues becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be 'particular cautious' about granting the employer's motion for summary judgment.") Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998.)

VIII. The Fifth Circuit in 1971 Caldwell v. National Brewing Co., 443 F.2d 1044, 1066 (5th Cir. 1971) Allows section 1981 retaliation claims to proceed without exhaustion of Title VII administrative remedies. Petitioner file this law suit under Title VII of the Civil Rights act of 1964

including Section 1981. Petitioner did in fact check off the retaliation box on charge questionnaire. Since this law suit is totally. based on retaliation by Respondent during the 5 years of Petitioner's employment no time barred administrative remedies exist and Petitioner's retaliation claim should proceed which also brings into action the retaliatory remark by Mr. Hoeferlin that, "he is to old and to slow" and consequently is not barred and does not contain any administrative enforcement scheme, there is no exhaustion of administrative remedies to this law suit.

A. Petitioner was denied taking MA test necessary for all Promotions.

B. Petitioner's request to take MA test was canceled 5 times.

C. Petitioner was told he wasn't qualified for any promotion without MA test.

D. Petitioner was denied all promotions for 5 years of employment.

E. Petitioner was the only 56 year old level One employee with 5 years seniority who was passed over for all promotions while all other younger employees in rental were allowed to take the MA test and promoted.

F. Petitioner was demoted to a less appealing job as unproductive.

G. Petitioner was denied study material for MA test that other employees had.

H. Petitioner was replaced by a twenty-five (25) year old younger male.

I. **Petitioner was 59 years old at time of the discrimination remark.**

J. **Petitioner was forced to resign or be fired on March 3, 2004.**

K. **Petitioner complained about Supervisor's remark on March 21, 2001.**

L. **Petitioner filed charge with EEOC March 9, 2004 of age and retaliation.**

M. **Petitioner filed suit in District Court June 29, 2004**

N. **Petitioner filed Suit under Title VII Civil Rights Act of 1964.**

O. **Petitioner filed Suit under "Section 1981" extending charge 5 years.**

P. **Petitioner has proven the existence of age discrimination by the Respondent's crusade to terminate Petitioner and retaliate against him for 5 years.**

Q. **District Court erred in summary judgment by dismissing section 1981 as time bared when under section 1981 extended time to 4 years well within the time Petitioner made his charge with the EEOC on March 9, 2004.**

R. **District Court erred in its decision to classify the remark of "he is to old and to slow" as a "stray remark." This remark was made by a decision maker who was the Petitioner's immediate supervisor at the time of this remark directly related to the decision making process of Petitioner's career. This remark was a direct and**

S. intentional reflection of discriminatory action by Respondent, which has led to the Petitioner's assertion of an orchestrated crusade of punishment by Respondent for filing a discrimination complaint, which led to the Respondent demoting Petitioner to a less appealing job.

T. The Eight Circuit erred in it's ruling "without" any explanation regarding its decision to uphold the district courts summary judgment and dismiss Petitioner's case without any regard to the Supreme Court's ruling on June 23, 2006 which Petitioner filed a brief dated June 23, 2006 regarding the Supreme Court ruling which the Eight Circuit Court stated, "Appellant's motion for remand is hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits.... Dated June 30, 2006, Order entered under rule 27B(a): sign by Clerk, U.S. Court of Appeals, Eighth Circuit.

U. Chad Kavanaugh, Group Rental Manager on or about September 2002 in the back parking lot of enterprise at 8844 Ladue Road in St. Louis told Petitioner that, "other Management employees are out to get you" which ultimately caused the Respondent to be shifted to a less appealing job and demoted to the call center and forced into his termination of, "resigning with

benefits or being fired without "any" benefits.

PETITIONER'S OPPOSITION TO DISTRICT COURT AND THE EIGHT CIRCUIT COURT OF APPEAL GRANTING SUMMARY JUDGMENT FOR RESPONDENT

COMES NOW, Petitioner, respectfully requesting the Supreme Court of the United States apply the Supreme Court's ruling that strengthens civil rights on the job resulting from a 9-0 ruling upheld June 23, 2006 that bars employers from discriminating against employees who complain of discrimination that applies to claims of trivial actions discrimination based on race, religion, ethnicity, age or disability. In the case now before the Court, Enterprise retaliated against Petitioner after complaining that Keith Hoeferlin told Petitioner that, **"he was to old and to slow."** Petitioner was subsequently denied the opportunity to take the MA Test required for promotions within the Enterprise system. During the next five years Petitioner was repeatedly denied promotions and was demoted to the call center. Petitioner has repeatedly brought this to the attention of the District Court and the Eight Circuit Court in Respondents original pleadings and the motion sent to the Eight Circuit Court. **On January 10, 2007 The Eight Circuit Court denied the Petitioner's motion (Case 05-4098) without consideration of the Supreme Court's ruling on June 22, 2006 regarding The Civil Rights Act of 1964.** Petitioner was told by opposing Counsel that, "I will get the District Judge to rule that the remark made **by Keith Hoeferlin to the Petitioner,** "he was told and to slow" **was a** "stray remark."

The District Judge allowed the "stray remark" rule when in fact the remark was "directly" intended to destroy the Petitioner's career which subsequently led to Petitioner being denied any and all promotions for 5 years in "retaliation" to Petitioner's discrimination complaint to Enterprise Leasing Company of St. Louis. Petitioner was subsequently demoted and replaced by a much younger 25 year old man. Thus, the discriminatory "intended" remark by Mr. Hoeferlin was not in fact a "stray remark" but rather is highly probative of discrimination bias which outlines motive and intent subsequently used against Petitioner throughout the next 5 years of his employment. How can a District Court Judge, "Charlie Shaw," tell the Petitioner, "I don't believe you," grant summary judgment for Respondent with a **"trial demanded,"** then be sent to the Eight Circuit and they **"deny my motion,"** accepted the District Judge's statement and disregard the Supreme Court's ruling of June 23, 2006? How can a $9.7Billion Dollar company continue to use court trappings and their lawyering to escape a discrimination charge plagued with motive and intent to discriminate, then call it a stray remark?

Of the 11 lawyers I asked to take this case not one lawyer in St. Louis wanted to touch this case against Enterprise... Why? All the discrimination cases filed in St. Louis from this Company were in fact settled out of court. Respondent does **NOT** want this case to go to trial. Opposing counsel told the Petitioner, **"this case will never go to trial?"** The Respondent does not want a conviction that will seriously destroy the creditability of their recruiting in this Country's Colleges! The continued act's of discrimination that are present in this company are real and I'm one of them! Enterprise

Leasing of St. Louis and opposing counsel will go to no end to have this case not be heard by the Supreme Court of the United States because the issues presented here are all true so help me God!! How about some old fashion questions of how, why and who done it... be answered!

Petitioner should be entitled to a jury trial based on the Supreme Court's new ruling on June 23, 2006 because this case is all about **"RETALIATION"** against this former employee complaining of discrimination. Retaliation of complaints where the Petitioner was told, "he is to old and to slow;" denied promotions for 5 years for not being "qualified" for which Enterprise withheld my rights to take the MA Exam they say is required to get promoted and demoted to a lesser work assignment, including elements of pay being reduced is not **"MINOR**!" The Supreme Court's ruling clearly states, **"a rule that bars all "trivial" actions against a complaining employee."** In light of this Supreme Court ruling on June 23, 2006 Petitioner respectfully request the Supreme Court remand this case to trial considering the age of the Petitioner (60 years old) being a 5 year level one employee who Enterprise has admitted that Petitioner was not qualified for any promotions without passing the required MA test to be qualified for a promotion which was intentionally denied to the Petitioner. This 9-0 ruling clearly rules that Enterprise discriminated against the Petitioner based on age, denying him promotions and demoting the Petitioner in retaliating against Petitioner for filing a discrimination complaint to management. Enterprise responded by shifting him to a less appealing job without any opportunity to be promoted for over a period of five years.

This case was originally filed on June 29, 2004. With the

ruling for the Supreme Court on June 23, 2006 the District Courts Motion of Summary Judgment for the Respondent should be overturned as the District Court erred from case law referenced in the Petitioner's original brief Dated December 28, 2005. In this case the District Court and the Eight Circuit Court has prohibited the Petitioner from establishing, "by case law " the right to a trial that reveals the existence of "genuine issues as to material fact that now exists" as outlined in the New ruling from the Supreme Court for the Petitioners case now before the Supreme Court of the United States. Petitioner requests the Supreme Court of the United States to over turn the **District Courts Motion of Summary Judgment for the Respondent as the District Court** and the Eight Circuit Court erred from case law prohibiting the Petitioner the right to a trial that reveals the existence of "genuine issues as to material fact." The Respondent is not entitled to a judgment as a matter of law when the Petitioner has established and will establish again in this filing sufficient facts showing that an essential element of discrimination exists with genuine issues as to material fact essential to one or more elements of Petitioner's case in a trial. Given the sensitive nature of the Supreme Court's ruling on June 26, 2006 regarding the baring of all trivial actions against a complaining employee extends the "baring of time sensitive filing" in this case because Enterprise Leasing Company of St. Louis started and continued the retaliation beyond any time baring resulting from the remark, "he is to old and to slow" even though the retaliation began right after this remark was made and continued for 5 more years. Thus the "time barred reference from the District Court should now allow this claim of discrimination to proceed to trial. This major issue has been the contention of the Petitioner all along

that the Respondent extended the time due to their continued acts of discrimination by denying Petitioner any and all promotions themselves by denying the MA exam. Petitioner was told that the MA exam was not applicable to the position that Respondent was demoted to thus continuing the time that prohibited the Petitioner from ever being promoted with acts of retaliation.

Even following the Celotex Trilogy the Seventh Court of Appeals – maintained the view that a heightened level of scrutiny should be applied on a motion for summary judgment in an employment discrimination case because of issues of "intent and credibility" are generally involved. See e.g., Webb v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991, 997 (7th Cir. 2000) ("The district's court grant of summary judgment will be affirmed only if the record as a whole reveals no genuine affirmed issue of material fact and that the moving party is entitled to summary judgment as a matter of law. We apply this standard with added vigor in employment discrimination cases, where intent and credibility are crucial issues.)" Talanda v. KFC Nat. Management Co., 140F.3d 1090, 1095 (7th Cir.1998) ("When the case before us is a summary judgment ruling in an employment discrimination case, in which credibility and intent are crucial issues, we review the record with heightened scrutiny.) Bassett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000) ("In remanding for trial, we emphasize the oft repeated phrase that summary judgment should seldom be granted in discrimination cases.") Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998 ("Where a plaintiff in a discrimination cases makes out a prima facia case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination,

courts must be 'particularly cautious' about granting the employer's motion for summary judgment.") Thompson v.Orange Lake county Club, Inc., 224 F. Supp. 2d 1368, 1372 (M.D.Fla. 2002) ("In cases where employment discrimination has been alleged, the Eleventh Circuit has long stated that the district courts should exercise caution in granting summary judgment because such cases usually involve the examination of motive and intent.") Coleman v. Holiday Inn Select, 158 F. Supp.2d 923, 927-928 (E.D. Ark 2001) ("Given the fact that discrimination cases most often rest upon inferences rather than direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant and 'summary judgment should seldom be used in employment discrimination cases.")

In this case Petitioner should survive the Respondent's summary judgment in one of two ways. The first is by proof of "direct evidence" of discrimination and two the McDonnell Douglas analysis, including sufficient evidence of pretext. How can the District Court assume that Petitioners claims of race, sex and national origin are not like or reasonable related to Petitioner's allegations when the EEOC asserts that they exists and subsequently issues a right to sue letter? The direct evidence of this material fact in which Mr. Keith Hoeferlin, Sales and Marketing Manager stated "your to old and to slow," Matt is younger and "I've seen him whip through the extensions and claims faster than you," fatally contaminates this entire employment discrimination case, i.e., I was appointed to the Enterprise Diversity Team due largely to my age of 60, which represented the older age groups of Enterprise. After serving on this committee for almost a year and having

written many briefs regarding Diversity, I was demoted from the Diversity Team by **Jeff Weiss** as I was an embarrassment to Enterprise Leasing Company of St. Louis for being a level 1 employee for 5 years not ever having been promoted, but I was appointed to this position due to my age, thus "the inference of unlawful age discrimination," and the inference that since I was to old, therefore I was to slow, therefore I was not qualified for any promotion due to my age of 60.

This case is entirely about age discrimination, where upon Enterprise failed to promote, failed to provide study material, failed to allow Petitioner to take the M.A. test and adverse race discrimination that involves the examination of "motive and intent." This court allowed all the above material facts including age discrimination, which is now so crystal clear that the motives of my age of 60 played heavily upon all the middle and senior managers interviewing me that I was too old and to slow and that "I didn't qualify for a position."

Once this material fact of complaining that I was too old and too slow my entire career was fatally contaminated. This prima facie case is clearly established by Enterprise replacing me with a younger individual thus my performance was seen as substandard was false and the real reason was age discrimination being to old. Typically the elements of the Petitioner's prima facie case is performing my duties for four years in a satisfactory manner or better; was qualified for the two positions I held for 5 years, i.e. a "rental" employee and an "in-house call back representative" subjected to an adverse employment action. The employment action, "I was demoted and lost substantial income which is an adverse race employment action." Stutler v. Illinois

Dep't of Corrections, 263 F.3d 698, (7th Cir. 2001) ("Not everything makes an employee unhappy is an actionable adverse action. Negative performance reviews, a change in job title, an increased travel distance to work, do not by themselves qualify. Neither does the loss of a telephone or cubicle. To be actionable, there must be a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Supreme Court in Burlington Industries, v. Ellerth, 524 U.S. 742, 118.Ct. 2257 (1998 and Faragher v. City of Boca Raton, 524 U.S. 775. 118, S.Ct. 2275 (1998), defined a "tangible employment action" as a "significant change in employment status." Ellerth, 524 U.S. at 760, 118S.Ct. at 2268. Examples include: hiring and firing, promotion and failure to promote, demotion, undesirable reassignment with significantly different responsibilities, a decision causing a significant change in benefits, compensation decisions and work assignments. See Ellerth, 524 U.S. at 760 and 764, 118 S.Ct. at 2268, and 2270; Faragher, 524 U.S. at 789, 803, 808, 118 S.Ct. 2284, 2291, and 2293. The Supreme Court stated that there must be a significant change in employment status; it did not require that the change be "adverse" in order to qualify as tangible. This is a demonstrated Prima Facie Case of Discrimination. Enterprise Leasing Company of St. Louis treated other employees much younger than Petitioner, which is outside the class of being older, more favorably. The District Court has ordered the Petitioner to expose his hand regarding all matters regarding this case and, in fact, has done that. But, Respondent has yet to expose his hand regarding Petitioner's interrogatories including Petitioner's request for production of documents and things through the filing of this document. Mr. Keith

Hoeferlin's direct statement regarding my being demoted when he said, "I was to old and to slow is not a "Stray Remark." The comment was not, in fact, stray remarks; the comment is evidence of pretext; the comment is relative to show current corporate atmosphere and practices; the comment was intentional; the comment was made with intent to destroy credibility of the Petitioner with regard to his age with the inference of being slow which had an adverse effect on Petitioner not being promoted, not qualified for any promotions and that is far from a stray remark. The discriminatory comment is not a "stray remark" because they were made by decision-makers in a manner related to the decisional process. In her concurring opinion in Price Waterhouse v. Hopkins,49 U.S. 228, 109 S.Ct. 1775 (1998), Justice O'Connor, "indicated that discriminatory workplace comments could be used as direct evidence of discriminatory animus if the decisions were made by the decision-makers in the context related to the decisional process..." Mr. Keith Hoeferlin, Sales and Marketing Manager is the decision maker is this issue and was Plaintiff's Supervisor. Mr. Hoeferlin's remark that Plaintiff was to old and to slow certainly supports a showing of discriminatory intent. This remark is highly probative of discriminatory bias and such comments are surely the kind of fact which shows a trier to raise an eyebrow thus providing additional threads of evidence that are relevant to the jury to show the corporate culture in which Enterprise Leasing Company of St. Louis makes its employment decisions and can be used to show circumstantial evidence of discrimination. And this discriminatory remark is not the sole basis upon which the plaintiff bases the claim of discrimination. This remark is certainly relevant and, along with the other substantial evidence a strong inference of intentional

discrimination to age bias was present, and planned.

Enterprise Leasing Company of St. Louis has been sued for engaging in illegal employment discrimination. Indeed Enterprise has been apparently sued so many times that they are unwilling to provide this information to Petitioner in response to legitimate interrogatories. Defense counsel used his gamesmanship during discovery to confuse the deposition when Plaintiff was merely elaborating upon, explaining and or clarifying questions about discrimination and age bias when asked questions by defense counsel. That being said, acts of discrimination were, in fact, the reason Petitioner wasn't promoted. Petitioner even went so far as to send an email to the candidate, who he knows well including her supervisor, indicating that said candidate was well qualified and deserved the promotion. Petitioner sent said email as a gesture of being kind and a congratulatory note. Defense counsel made it appear that Petitioner was confessing to lack of qualifications and that there wasn't any discrimination evident and that's simply not true.

This case involves a suit filed by Petitioner Rad W. Hamilton –vs- The Respondent, Enterprise Leasing Company of St. Louis for acts of failure to promote based on age, forced resignation due to age and reverse race discrimination. Age bias within the employment ranks of the rental division within Enterprise Leasing Company of St. Louis ranges from the newly college graduate to the 20s. Employee's in their 60's and up are at greater risk of termination than those in their 20's, as is the case of the Petitioner. The percentage of employees hired within the rental division of Enterprise Leasing Company of St. Louis who are in their 20s ranks in the 99% category while employees who are hired in their 50s and 60s are 1%. Corporate policy on hiring, training, promoting or

termination ends up hurting older workers than younger workers within Enterprise Leasing Company of St. Louis. Enterprise Leasing Company has proven they will choose the younger of two applicants to hire, the younger to promote and the younger to keep in a reduction of workforce. The economic incentive for Enterprise to shed older workers have higher and expensive health cost. Petitioner was diagnosed with cancer only months before his forced termination March 1, 2004 while employed with Enterprise Leasing Company of St. Louis losing a career opportunity.

BASIC FACTS OF CASE:

Plaintiff states the following disclosures for its claim of $18,250,000 against Enterprise Leasing of St. Louis doing business as Enterprise Rent-A-Car where Plaintiff was employed from October 28, 1998 to March 3, 2004. The following represents the basis of this lawsuit pursuant to Title VII of the Civil Rights Act of 1964:

A. Enterprise Leasing Company of St. Louis intentionally prevented Appellant from passing the Management Assistant grills test thus prohibiting and promotion.

B. Enterprise Leasing Company of St. Louis discriminated against the Appellant by telling him, "he is to old and too slow and Matt is younger and faster and can whip through callbacks faster creating a continuing violation of a hostile work environment.

C. Enterprise Leasing Company of St. Louis

failed to provide study material for the Management Assistant (MA) test required for promotion creating a hostile work environment that was provided for all other employees.

D. Enterprise Leasing Company of St. Louis discriminated against Appellant by promoting younger employees who were given the Management Assistant (MA) study material and the grill necessary for promotion that was denied to Appellant and told by management that he had to find the study material on his own.

E. Enterprise Leasing Company of St. Louis failed to provide one-on-one study review material with branch management that was given to all other employees in rental and denied to Appellant.

F. Enterprise Leasing Company of St. Louis' senior management was out to get the Appellant causing the Appellant to be removed from his position as an in-house call back representative.

G. Enterprise Leasing Company of St. Louis allowed management Personnel to intentionally contribute to false allegations causing Appellant into forced termination from Enterprise on or about March 3, 2004.

H. Enterprise Leasing Company of St. Louis

employees listed below were given study material and the grill, which was denied to the Appellant by senior management Chad Kavanaugh.

Angie Ritter, MA	Nicole Sneller, MA
Lauren Goldstein, MA	Beka aumgartner, MA
Michael Eyler, MA	Anita Harrison, MA
Todd Kline, MA	Chris, Moore, MA
Meghan Buchert, MA	Abby Raboin, MA
Amanda Willard, MA	Kevin Donnelly, MA
Steve Elli, MA	Claire Hanneken, MA
Tara Nesbitt, MA	Jeff Jewett, MA
Brian Jones, MA	Joe Poole, MA
Angelia Williams, MA	Ron Voegtli, MA
Jeff Pirozzi, MA	Jeremy May, MA

Appellant received annual reviews that range from "meets requirement" dated 10-26-99; "exceeds requirements" and "outstanding" dated 10-26-00; to "meets requirements" and "exceeds requirement" dated 10-30-03; and then in November 2003 through May 2004 the review was characterized as "requires improvement" resulting from hostile work environment complaints created by other employees of Enterprise Leasing Company of St. Louis and Employees from Farmers Insurance Company where Plaintiff was assigned as an in-house call back representative. Keith Hoeferlin was the discriminator and also evaluated Appellant's Performance. The courts have held that a Appellant need not demonstrate satisfactory job performance where the alleged discriminator is the same individual who judged the Appellant's performance inadequate. See, e.g., Oest v. Illinois Dep't of Corrections, 240 F.3d 605, 612 (7th Cir. 2001). Mr. Chad Kavanaugh told Plaintiff that Enterprise employees are "out to get you" and that was Keith Hoeferlin the discriminator who evaluated Appellant's

performance which was placed in Appellant's personnel for all to review when Appellant was denied promotions, demoted from two positions with large reduction of income which represents the foundation of this law suit. Mr. Hoeferlin also asked me for advise regarding a possible discrimination claim brought on by Tammy Bufford if she wasn't promoted to the In House Manager at the Metropolitan Life Insurance company. Mr. Hoeferlin also stated that he and other Managers saw her as a trouble maker during her 7 years of employment and that she had been passed over for promotions. This fact makes this law suit for the continued acts of discrimination carried out by middle management against me and other employees who were disliked. The mere existence of such planned behavior by these two middle management employees within Enterprise (Chad Kavanaugh and Keith Hoeferlin) was orchestrated to force feed a planned termination to get rid of me which was carried out on March 3, 2004.

I was basically forced to file this law suit Pro Se since the eleven discrimination attorneys I spoke with would not represent me since there would be a conflict of interest with cases they have pending. Considering the number of discriminating cases that have gone to court or have been settled out of court, this law suit takes on a different level with a 62 year old male and former employee. Discrimination is an ugly thing. We've all dealt with these issues hundreds of years ago and will deal with it hundreds of years in the future.

It is my explicit opinion that the real act of discrimination is not the one doing the discrimination acts inside Enterprise Leasing Company of St. Louis, it's the silent majority of higher management who think they can get

away with or use the trappings of the court and their lawyers to cover it up or have it dismissed. These individuals or company's who practice acts of discrimination like Enterprise Leasing Company of St. Louis, no matter who they are, they are not above the law, although they believe the little guys will not or cannot stand up to an annual $9.3 Billion Dollar Company such as Enterprise Leasing Company of St. Louis.

NARRATIVE RELATIVE TO LIABILITY AND DAMAGES

The reprehensibility of the Defendant, Enterprise Leasing Company of St. Louis caused economic harm to the Plaintiff. The conduct involved repeated actions and the harm was the result of intentional malice, trickery and deceit which, was not an accident but rather completely orchestrated by middle and senior management within Enterprise Leasing Company of St. Louis. The following graft outlines lost wages, loss of Social Security Benefits, pain and suffering plus punitive damages:

Age	Actual Starting Salary	New Salary	Annual Increase		
56	32,000				
57		36,800	15%	Assuming 2 promotions	
58		37,904	3%		
59		39,041	3%		
60		44,897	15%		
61		46,244	3%		
62		47,632	3%		
63		49,060	3%		
64		50,532	3%		
65		52,048	3%		
66		53,610	3%		
67		55,218	3%	354,344	To full SS benefits
68		56,875	3%	3,185,000	Plus Pain & Suffer
69		58,581	3%		
70		60,338	3%		
	Total	530,138			
	Plus Punitive	15,000,000			

PERSONS WHO SHOULD PARTICIPATE IN THIS TRIAL: Plaintiff intends to subpoena for a trial the following Enterprise personnel who all work at Enterprise Leasing Company of St. Louis in management positions. In the absence of witnesses outside of Enterprise Leasing Company of St. Louis, the witnesses below are employees of Enterprise with knowledge of the facts stated in this case. Plaintiff ask the Defense Counsel if the Defendant will make available these witnesses for trial but as to date defense counsel has not responded.

a. Sheryl Scheve
b. Craig Harashe
c. Dereald Brown
d. Keith Hoeferlin
e. Bobby Zoelzer
f. Rory Robinson
g. Kate Sachs
h. Adam Milburn
i. Chad Kavanaugh
j. Doug Comero

Mr. Andrew Taylor, Chairman, recently wrote in his Enterprise Magazine, "What keeps a wealthy man working as hard as I do?".... "my job is to remove barriers so that you and your branch and your team of people can be successful. I am here to serve you not the other way around".... "the thing that turns me on is when people start at this business, matriculate through and end up being very successful personally, having successful families, being part of the community, That's what this is about... the money's great, but that's better." Enterprise Leasing Company of St. Louis didn't remove barriers for me, they built them with the intent to keep me from being successful. I was not allowed to matriculate through their system and only ended up in forced termination only to be told I'm to old and to slow due to age and reverse race discrimination.

Why is that a Corporations like Enterprise Leasing

Company of St. Louis think that they have the right to discriminate against a 62 year old employee, tell him he's the blame for everything then seek court intervention that in some desperate way all the claims made in this law suit didn't really happen only to allow it to be covered up. Given the circumstances of this case and the employees who participated in this orchestrated witch hunt to force my termination will be called to testify under oath their involvement. It remains to be seen whether these employees will tell the truth or commit perjury. The Company's Diversity Team Mission Statement is an out right fabrication of lies when it says, "promote an inclusive, professional and fair work environment that is free from stress of racial divisiveness and discrimination. 'We will do this by focusing on our Enterprise Family, assisting employees in balancing work and life commitment and educating our employees at every level to recognize and embrace our differences..." How can Enterprise Leasing of St. Louis help younger employees with study material that assisted them with their MA test and grill that ultimately was responsible for their promotions, but tell me that I'll have to did it out on my own cover up the real people who created all the complaints alleged against me and falsely accuse me of just about everything in the book to force me out of the Enterprise Family Employment Opportunity and then discriminate against me and file motion after motion to have the facts dismissed. Rarely do Appellants find corporate memos mandating that gray heads roll, so their lawyers try to make their case with statistics, anecdotal evidence and trappings of the court to dismiss motions that are damaging to the Defendant. Appellant should be awarded loss wages, emotional stress, pain and suffering, breach of contract, defamation, libel and/or slander, compensatory or punitive damages, interest, and taxes on

the amount sought in this case. While Plaintiff is committed to or invested in this trial process, it is inherently unfair for the Plaintiff to be burdened with paying the cost of this mediation considering the intentional malice, trickery and deceit orchestrated by middle and senior management within Enterprise Leasing Company of St. Louis.

This entire case of age, sex, race, discrimination and termination transpired over the entire 5 years of employment which was equitably noted through continued acts referenced above. In Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148 (2003), the Supreme Court held that a Plaintiff does not have to present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII. Hense, under the mixed-motive Plaintiff need only demonstrate, by either direct or circumstantial evidence, that the employer was "motivated" to take the adverse action a forbidden reason, the fact that a permissible Appellant "Demanded A Trial" and the District Court has violated all the case laws referenced and dismissed "ALL" issues surrounding this case as though they never happened. This is unconstitutional to not allow the Appellant to a fair trial. Bassett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000) ("In remanding for trial, we emphasize the oft repeated phrase that summary judgment should seldom be granted in discrimination cases.") This case has been riddled with continued suggestions by the Appellee's Counsel that says, "I will GET the Judge to rule on this," issue or that issue given the element of preferential treatment or special consideration, which in the end result, has taken place. The District Court has favored for the Appellee in every issue regarding this case and has blatantly overlooked the "case law" references made in

my filing. The District Court's said Petitioner needed "to prove his ultimate burden of persuasion, that age actually motivated Enterprise's decision. The District Court also stated "Enterprise investigated the claim and found no evidence to support Hamilton's allegation." This allegation is the remark made by Hoeferlin that "I was too slow and Matt was younger and faster and "can whip through call backs faster." The Appellant reported this incident to Jeff Weiss, Human Resource Manager and Dan Decker, both have confirmed this in a meeting held with me present at the Metropolitan Life Insurance Building Cafeteria and both stated that, "Hoeferlin was joking." I asked how Keith Hoeferlin could be joking when he was yelling at me. This was not a stray remark but rather a deliberate statement to discriminate against my age and they knew it! How can the District Court state that Enterprise investigated the claim and found no evidence to support Hamilton's claim. The District Court is practicing double standards with this case. The District Court says, "they don't believe Hamilton, but the court "believes Enterprise solely based on their here say! Case law says, "summary judgment should seldom be granted, "Bassett v. City of Minneapolis, 211 F3d 1097 (8th Cir. 2000). The District Court has erred in so many ways to disallow this case being remanded to trial as requested by the Appellant in his original filing!

Now, comes the Counsel continue stating that they will get the Judge to rule in their favor regarding everything concerning this case even stating at the ADR, "this case will never go to trial!" Counsel for the Appellee, in fact, sent an email to the Appellant after Appellant filed a motion for an appeal at which time Counsel told Appellant that, "there is a startling revelation coming regarding this appeal," (as if to suggest

that there is a fore drawn conclusion already been decided regarding this appeal that continues to foster the prejudice opinion against the Appellant that the summary judgment will be upheld! Why would Counsel tell me such a statement if Counsel didn't already know the out come?

This case has been a bitter epilog and according to the rulings of case law coming from the 8th Circuit Court held in 2000 that "summary judgment should seldom be granted in discrimination cases," and that in 2003 the Supreme Court held that a Plaintiff does not have to present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII., thus, this case should not be ruled by District Courts but rather a jury. It certainly appears opposing Counsel's remarks prevailed in the District Court's decision to show prejudice against the Appellant and for the Appellee. Why is the law based on trickery and prejudice that the Court doesn't believe one and does the other and turns to blind justice on the pretense that nothing really occurred and call it a stray remark? Why do the trappings of the Court distort the truth that would obviously prevail in a jury trial? Respondent's Counsel has directly mislead the District Court and the Eighth Circuit Court based on the following:

ARGUMENT

Respondent's Counsel accuses Petitioner of "unfounded accusations of misconduct leveled at this Court, The District Court, and Enterprise's Counsel."

PETITIONER'S RESPONSE: Petitioner has not made any accusations against The District Court or The Eighth Circuit Court. Upon continued inferences

from Counsel, that, HE, the Counsel, was going to get the Judge to get this dismissed or that dismissed was, in fact, achieved. Petitioner made reference to these issues to Counsel and has never spoken with either Court. Counsel deliberately brought focus to this issue and perpetuated it himself. Perhaps if Counsel had keep his intended action comments to himself He wouldn't need to answer to these false accusations he created which, he included in his brief in BOLD CAPS!

Respondent's Counsel states, "the District Court correctly held that several of Plaintiff's allegations of employment discrimination, race, sex, national origin discrimination under Title VII and age discrimination under the ADEA that occurred more than 300 days prior to the date of his charge questionnaire."

PETITIONER"S RESPONSE: With the Supreme Court's 9-0 ruling on June 22, 2006 regarding the Civil Rights Act of 1964, Congress made it illegal for employers to retaliate against employees who complain of discrimination based on race, religion, ethnicity, age, and disability and bars all but trivial actions against a complaining employee. This discrimination suite is all about age discrimination, not alleged age discrimination and CERTAINLY NOT "TRIVIAL" action by Respondent with the "he is to old and to slow" remark by Keith Hoeferlin. Respondent did, in fact, retaliate against Petitioner for 5 years resulting from Petitioner's complaint to Jeff Weiss, Human Resource Manager which, is well documented.

Respondent's Counsel states, "Plaintiff's timely

allegation of age discrimination fail. Plaintiff admitted that he failed to meet necessary qualifications for advancement, and he admitted that his age was not a factor in his resignation."

PETITIONER'S RESPONSE: Plaintiff made a statement that he failed to meet the necessary qualifications for advancement because the Respondent did not qualify for such advancement because Respondent would not allow Plaintiff the same right's as all the other employees to take the MA test necessary FOR any advancement. Respondent NEVER said he didn't qualify, Respondent didn't qualify after Respondent retaliated against Plaintiff and would not allow the Plaintiff to take the MA test for 5 years. The age of the Plaintiff was and is the center of this discrimination suit and remains a big factor not in Plaintiff's resignation, but rather "be FIRED without any compensation. Respondent told Plaintiff on March 3, 2003 he was going to be fired or resign and presented Plaintiff with a document to that effect. On that DAY total "retaliation" including Plaintiff's age was the cause for Plaintiff's forced FIRING RESIGNATION! Counsel once again deliberately extracted "out of context" the age issue and made it part of his cause for dismissal.

REASONS FOR GRANTING THE PETITION

This Court has hasn't provided the lower courts with authoritative guidance regarding Title VII of the Civil Rights Act of 1964 until its 9-0 ruling that strengthens the enforcement of civil rights laws in the work place by ruling that employers may not punish workers who file discrimination complaints by shifting them to a less

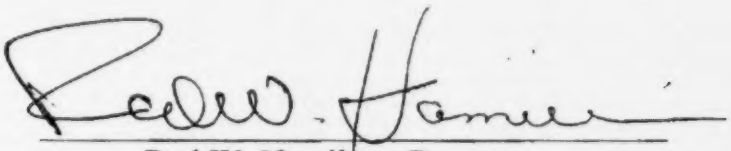
appealing job. This ruling also includes claims of discrimination based on race, religion, ethnicity, age, and disability. AS a result the district courts and the circuits seem to be sharply divided regarding the elements necessary to state a claim under this new ruling. The Eighth Circuit gave no weight to this new ruling. The circuits are sharply divided regarding the granting of summary judgment in discrimination cases including discriminatory workplace comments that could be used as direct evidence of discriminatory animus. This Court's review is warranted to reconcile these sharply divergent readings of discriminatory cases to ensure that – consistent with the Court's TEACHINGS- litigants and lower courts do not distort the statute intended by this Court. Because the question presented by this case has profound ramifications for all workers who file discrimination complaints especially with the new 9-0 ruling, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that the Supreme Court of the United States affirms it's 9-0 ruling on June 22, 2006 in the Civil Rights Act of 1964, the basis for the age discrimination that bars all race, religion, ethnicity, AGE, disability, or retaliation actions against a complaining employee, granting Petitioner a trial by jury and over turn the District Courts summary judgment for the Respondent and the Eighth Circuit Court's motion of denying Petitioner's appeal and remand for trial.

Signed this 7th day of March 2007.

Respectfully Submitted,



Rad W. Hamilton, Pro se
Petitioner

APPENDIX A

25 PAGES

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

RAD W. HAMILTON,

Plaintiff, No. 4:04-CV -802 CAS

v.

ENTERPRISE LEASING COMPANY OF ST. LOUIS,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on defendant Enterprise Leasing Company of St. Louis's ("Enterprise") motion for summary judgment and motion for sanctions for premature pleading. Plaintiff Rad Hamilton filed two motions opposing Enterprise's motion for summary judgment and a response in opposition to defendant's motion for sanctions.1 For the following reasons, the Court will grant defendant's motion for summary judgment and deny defendant's motion for sanctions.

I. Background

Hamilton filed this action against his former employer Enterprise alleging claims under Title VII of the Civil

Rights Act of 1964, 42 D.S.C. § 2000e, et seq. and 42U.S.C. § 1981. Hamilton alleged that Enterprise discriminated against him based on age, sex, race, and national origin by forced termination from employment, failure to promote, failure to provide study materials and review, hostile work environment, and promotion of younger workers. In an order issued January 12, 2005, the Court dismissed plaintiff s claims under Title VII, claims under the Age Discrimination

---

1 Hamilton filed his first memorandum in opposition to defendant's motion for summary judgment on June 27, 2005, several days before defendant filed its motion for summary judgment on July 8, 2005. Then, Hamilton filed a response in opposition to defendant's motion for summary judgment and motion for sanctions on July 11, 2005.

in Employment Act ("ADEA") that occurred more than 300 days prior to the filing date of plaintiff's charge questionnaire, and plaintiffs claims of age, sex, and national origin discrimination under 42 U.S.C. § 1981. Enterprise brings this motion for summary judgment regarding plaintiff's remaining claims.

II. Summary Judgment Standard

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett,

477 U.S. 317,322 (1986); Board of Education. Island Trees v. Pico, 457 U.S. 853, 863 (1982). The moving party must initially demonstrate the absence of an issue for trial. Celotex Coro., 477 U.S. at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. Board of Education v. Pico, 457 U.S. at 863. Nevertheless, once a motion is properly made and supported, the non-moving party may not rest upon the allegations in his pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); Buford v. Tremayne, 747 F.2d 445,447 (8th Cir. 1984). Summary judgment must be granted to the movant if, after adequate time for discovery, the non-moving party fails to produce any proof to establish an element essential to the party's case and upon which the party will bear the burden of proof at trial. Celotex C01:p., 477 U.S. at 322-24.

III. Discussion

A. Facts

The Court finds that the following facts are true for purposes of summary judgment.2 Enterprise is an automobile rental and leasing company based in St. Louis, Missouri. Within its operations, Enterprise has two divisions: rental and callback. The callback division handles customer issues by telephone, including insurance-related transactions, and the rental division comprises the stand-alone facilities where customers rent

or lease vehicles. The management opportunities within the callback division of Enterprise are limited. Most management opportunities are in the rental division. In order to be eligible for advancement to a management position in the rental division, an employee must successfully complete an internal test called the MA test. The MA test pertains to Enterprise's rental operations. Employees are selected to take the MA test by rental division management.

Hamilton is a 62 year old white male. Enterprise hired Hamilton at the age of fifty-six as a Level I non-exempt employee in its rental division. One of the individuals who interviewed Hamilton and hired him was Jeffrey Weiss, then Group Human Resources Manager. Hamilton worked in the rental division until November 12, 1999 when he requested a leave of absence. Enterprise granted

---

2Enterprise submitted a statement of uncontroverted material facts. Hamilton did not submit a statement of material facts as to which he contends a genuine issue exists. Local Rule 4.01(E) states that "every memorandum in opposition shall include a statement of material facts as to which the party contends a genuine issue exists. Those matters in dispute shall be set forth with specific reference to portion of the record, where available, upon which the opposing party relies." Further, "the opposing party shall note for all disputed facts the paragraph number from movant's listing of facts. All matters set forth in the statement of movant shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party." E.D. Mo. L.R. 4.01(E). Hamilton submitted

eight facts that he asserts represent the basis of his lawsuit pursuant to Title VII, but the Title VII claims have been previously dismissed by the Court. See Order of January 12, 2005. The Court therefore deems admitted defendant's statement of material facts. Moreover, the "facts" submitted by plaintiff are not supported by citation to the record.

plaintiff that leave and provided plaintiff with a $3,000.00 loan. When Hamilton returned to Enterprise in January 2000, his original position was no longer available. Enterprise offered Hamilton another rental position, but Hamilton did not want that position because it was too far away from his home. Enterprise then offered plaintiff an available position in the callback division, which Hamilton accepted.

1.MA Test and MA Study Materials

Hamilton wanted to take the MA test, but was never allowed to take the test. Hamilton alleges that several younger and non-white employees were allowed to take the MA test instead of him, including during the last year of his employment at Enterprise. Hamilton admits that all of those employees worked in the rental division when they were selected for and allowed to take the MA test. Hamilton is not aware of any Level I employee in the callback division allowed to take the MA test. No Level I employee from the callback division has ever been allowed to take the MA test. Hamilton does not allege that any younger employees in the callback division were treated more favorably than. he was. Prior to Fall 2003, Enterprise issued study materials for the MA test. Enterprise provided these materials to employees selected to take the MA test. Enterprise stopped preparing

and disseminating the study materials in the fall of 2003. Hamilton asserts that other employees were given these study materials and he thinks that this was done during his last year of employment. Hamilton obtained a copy of the study materials from another employee who had been provided with them by Enterprise. Hamilton does not allege that any Level I callback center employee was provided study materials for the MA test. But, Hamilton contends that if he were non-white he would have been given the study materials.

2. Promotions

Hamilton applied for several promotions in the rental division while he was working in the callback division. Enterprise did not promote Hamilton to those positions. Hamilton asked Weiss how he could become eligible for the MA test and promotion. Weiss met with Hamilton several times and told him he should return to the rental division to get promoted. Weiss told Hamilton there were few advancement opportunities working in the callback division, and there were none as to the promotions Hamilton had sought. Hamilton decided not to return to the rental division, despite the opportunity to do so. Hamilton only sought one promotion within the year prior to the date he filed his charge questionnaire against Enterprise on March 9, 2004.3 The one promotion Hamilton sought was a management position in Enterprise's truck rental division, which Hamilton states became available in February 2004. Between May 15, 2003, and March 3,2004, four openings similar to the one

sought by plaintiff were posted for application, only two were filled, and both were filled by employees who had passed their MA tests and were currently working on the rental side. Hamilton admits that he needed to successfully complete the MA test to be eligible for the promotion he sought. The individual promoted to the truck rental management position had taken and passed the MA test and worked in the rental division. Hamilton alleges that all non-white employees were promoted before him. Hamilton assumed that whenever a minority employee was promoted at Enterprise instead of him, it was an issue of race.

3Hamilton also asserts that he applied and interviewed for a promotion given to an Enterprise employee named Shari Westbrook, but he cannot recall the timing of that promotion. In his affidavit, Weiss asserts that Westbrook was promoted to a management position in the callback division (the same position Hamilton applied for) on September 10, 2001. This promotion occurred outside of the 300 day period preceding plaintiff's filing of his EEOC charge and will not be considered by the Court.

Hamilton asserts that Keith Hoeferlin, his supervisor, came to him and expressed concern about an African-American female employee who had not been promoted. Hamilton alleges that Hoeferlin expressed that he was worried that the African-American female should be promoted to avoid a discrimination lawsuit.

3. Diversity Team

During his employment at Enterprise, Hamilton was a member of the Diversity Team that was assembled to consider issues regarding workplace diversity at Enterprise. In November 2003, Enterprise restructured the Diversity Team. As part of that restructuring, Enterprise required that all Diversity Team members be Level n employees, obtain a recommendation for the team from their managers, and receive "meets requirements" or better on their most recent evaluations. Enterprise also reduced the number of members from thirteen to seven, replacing all members, including Hamilton, except for the manager of the Team and one other employee. Hamilton admits that his removal from the Diversity Team had nothing to do with his race.

4. Termination

Hamilton's last job with Enterprise was in the callback center located within the Farmers' Insurance offices. Hamilton agrees that he was put in that position because Enterprise "thought he could fix it." In that position, Hamilton handled callback automobile rental issues for Enterprise exclusively related to its customer Farmers' Insurance. While Hamilton was in that position, several employees and customers made complaints about him. Hamilton does not dispute that the complaints were made, although he alleges they were inaccurate. 4 (Def. 's Ex. E). As a result of the complaints, Hamilton received various disciplinary memoranda, including a written warning dated July 16, 2003.

4 The documented complaints alleged that Hamilton was rude to customers and rental agents, refused to return phone calls or pages, did not promptly answer the phone or check voicemail messages, and gave incorrect information regarding rentals, among other things.

This warning stated that "a consistent trend of complaints [exists] regarding your harsh communication and argumentative style" and it was "extremely detrimental to the workflow of the in house program and the performance that effects [sic] the flat rate program at Farmers." (Def.'s Ex. F).

Hamilton asserts that he was improperly blamed for performance issues because Teresa Shriver, a Call Center Manager in Kansas City, was upset that Farmers' Insurance office in St. Louis received a flat-rate rental program that she wanted for Kansas City. Hamilton believes that Shriver intentionally tried to sabotage the Farmers' Insurance program and he was simply caught up in the sabotage. Hamilton states that Shriver was able to influence his superiors in St. Louis and he was the scapegoat for her frustration. Hamilton agrees that this situation had nothing to do with his age or race. Hamilton also believes that he was blamed because of the difficulty of the position he held at Farmers' Insurance, which he admits had nothing to do with his age or race.

On March 2, 2004, Hamilton was issued a performance warning memorandum. (Def.' sEx. G). Hamilton was told that he was being placed on probation

due to the performance issues, effective immediately. Alternatively, Hamilton was given the option to resign with five weeks of severance pay. Hamilton chose to resign, but refused to sign the severance agreement. Enterprise still paid Hamilton the severance pay. Hamilton filed a charge questionnaire with the Equal Employment Opportunity Commission ("EEOC") on March 9, 2004. Plaintiff never filed a formal charge of discrimination against Enterprise.

Finally, Hamilton alleges that during a conversation in March 2001, Hoeferlin, his supervisor, told him that he was too slow and Matt (a younger colleague of Hamilton's) was younger and faster and "can whip through call backs faster." Enterprise investigated the claim5 and found no evidence

5 The record does not show when this investigation occurred.

to support Hamilton's allegation. Hoeferlin had no supervisory authority over Hamilton after September 2003, and no involvement with any promotion Hamilton sought in the final year of his employment or the decision to place him on probation. Hoeferlin has never had a role in selecting individuals to take the MA test. Hamilton admits that neither Hoeferlin nor anyone else at Enterprise every made any age-related comments to him either before or after the alleged statement by Hoeferlin in March 2001.

B. ADEA Claim

"Under the ADEA, it is unlawful for an employer to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1). Liability depends on whether age actually motivated the employer's decision. That is, the plaintiff s age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome." Tatom v. Georgia-Pacific COl})., 228 F.3d 926, 930-31 (8th Cir. 2000) (internal quotations and citations omitted).

1. Statement from Supervisor

Hamilton asserts that he has direct evidence of age discrimination because during conversation in March 2001, Keith Hoeferlin told him that he was too slow and Matt (a younger colleague of Hamilton ' s) was younger and faster and could whip through call backs faster. Enterprise states that their investigation found no support for Hamilton'sallegation. "[D]irect evidence... is evidence of conduct or statements by persons involved in making the employment decision directly manifesting a discriminatory attitude, of a sufficient quantum and gravity that would allow the fact finder to conclude that attitude more likely than not was a motivating factor in the employment decision." Erickson v. Farmland Indus..

Inc., 271 F.3d 718, 724 (8th Cir. 2001) (citations omitted).

The Court must" distinguish comments which demonstrate a discriminatory animus in the decisional process from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process." Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151, 1157 (8th Cir. 1999)(quoting Fast v. Southern Union Co.. Inc., 149 F.3d 885, 889 (8th Cir. 1998)). "Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference that the attitude was more likely than not a motivating factor in the employer's decision." Walton v. McDonnell Douglas Coq>., 167 F.3d 423, 426 (8th Cir. 1999)(citations omitted).

Hoeferlin was a decision maker unrelated to the decision making process at issue in this case. Hoeferlin did not supervise Hamilton after September 2003 and had no involvement in any promotion sought by Hamilton during his last year of employment or the decision to place him on probation. Also, Hoeferlin never had a role in selecting individuals to take the MA test. Hamilton does not contradict these facts as established by Enterprise. The comment was not related to any of Hamilton's claims regarding failure to promote, failure to allow him to take and to provide study materials for the MA test, removal from the diversity team, or termination.

The three year time span between Hoeferlin's

comment and the employment actions at issue also shows that there is no temporal connection. Hamilton's claims under the ADEA are limited to actionable claims that occurred no more than 300 days prior to the date his EEOC charge was filed, which was March 9, 2004. (See Order of January 12, 2004; Defs.' Ex. C). Hamilton alleges that Hoeferlin made the statement in March 2001. Assuming Hoeferlin made the comment, the event occurred far outside of the time period for filing a charge of discrimination with the EEOC.

Plaintiff asserts that there were continuing violations. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" National RailroadPassengerCoq>. v. Morgan, 536 U.S. 101,114 (2002). Hamilton's allegations of failure to promote, termination, failure to give him MA study materials, failure to permit him to take the MA test, and removal from the diversity team were separate discrete acts. Only the acts occurring within the 300 days prior to HamiltQn's charge of discrimination are actionable, so Hoeferlin's alleged comment is a stray remark and not relevant to Hamilton's actionable claims.

2. Failure to Promote

To establish a prima facie case on a failure to promote claim under the ADEA, a plaintiff must
show that (1) he is a member of a protected group; (2) he applied for and was denied a position for which he was

qualified; (3) despite his qualifications, he was rejected; and (4) the position was given to a person of similar qualifications who was not a member of the protected group at the time plaintiff's request for promotion was denied. See Lyoch v. Anheuser-Busch Cos..Inc., 139F.3d612, 614 (8th Cir. 1998). In a failure to promote case, a plaintiff must only demonstrate that he met the minimum qualifications for the position. Turner v. Honeywell, 336 F.3d 716, 721 (8th Cir. 2003). If the prima facie case has been established the employer has the burden of producing evidence that its actions were based on a " legitimate, nondiscriminatory reason," and the burden then shifts to the plaintiff to prove that the reason provided by the employer was a pretext for discrimination. Lyoch, 139 F.3d at 614. To prove his ultimate burden of persuasion, however, Hamilton must prove that age actually motivated Enterprise's decision. Nelson v. Boatmen's Bancshares. Inc., 26 F.3d 796, 800 (8th Cir. 1994).

The Court does not believe that Hamilton has alleged a prima facie case. Hamilton admitted that he was not qualified for the promotion that he applied for in the truck rental division in February 2004. In order to be promoted, Hamilton needed to take the MA test. Before he would be allowed to take the MA test, he had to work in the rental division. Hamilton admits that he did not work in the rental division despite an opportunity to do so and therefore was not eligible to take the MA test. Completion of the MA test was a minimum requirement

for promotion in the rental division. If Hamilton could not take the MA test, then he could not be promoted. Therefore, Hamilton was not qualified for a management position in the rental division and he cannot make a prima facie case for his failure to promote claim under the ADEA.

Plaintiff has also failed to meet the fourth requirement of the prima facie case: that the promotion was given to someone with similar qualifications who was outside the protected group. Hamilton has no evidence or knowledge of any Level I callback division employees, including younger or non-white co-workers, who were allowed to take the MA test, given MA study materials, or promoted to a management position in the rental division. (PI's. Dep. pp. 44:22-25,48:4-11, 122: 12-25-123:1-18).

In the alternative, even if Hamilton alleged a prima facie case, Enterprise has articulated a legitimate, nondiscriminatory reason for its actions, which Hamilton cannot show is a pretext for discrimination. As discussed earlier, Hamilton was not qualified for the position. Failure to meet minimum requirements for a position is a legitimate non-discriminatory reason for denial of a promotion. Hamilton has no evidence that age discrimination actually motivated Enterprise in its decision not to promote him. Therefore, plaintiff's claim of age discrimination regarding denial of promotion fails and summary judgment will be entered for Enterprise on that claim.

3. Failure to Permit Plaintiff to Take MA Test or Provide MA Study Materials

Next, Hamilton contends that Enterprise discriminated against him due to his age because it failed to provide him with MA study materials and did not permit him to take the MA test. To establish a prima facie case of age discrimination in this case, plaintiff must show (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances indicating age discrimination, or similarly situated employees who were not members of the protected class were treated more favorably. See Tatom, 228 F.3d at 931; Johnson v. Runvon, 137 F.3d 1081, 1082 (8th Cir.), cert. denied sub nom Johnson v. Henderson, 525 U.S. 916 (1998).

The Court finds that Hamilton has failed to make a prima facie case. As discussed above regarding plaintiff s failure to promote claim, plaintiff was not qualified to take the MA test or receive MA study materials because he was employed in the callback division. The MA study materials were only given to Enterprise employees selected to take the MA test, and the MA test was only given to employees in the rental division. Hamilton also fails to meet the fourth requirement in that he has no evidence of any similarly situated employees outside the protected group being allowed to take the MA test or receiving study materials. Hamilton has not refuted Enterprise's assertion that all employees given the MA

study materials and allowed to take the MA test worked in the rental division. Therefore, plaintiff s claim of age discrimination regarding access to MA study materials and permission to take the MA test fails and summary judgment will be entered for Enterprise on that claim.

4. Removal from Diversity Team

Plaintiffs complaint asserts that plaintiff was removed from the Diversity Team & Career/Family Focus Group because of his age. To establish a prima facie case of age discrimination regarding removal from the Diversity Team, plaintiff must show (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances indicating age discrimination, or similarly situated employees who were not members of the protected class were treated more favorably. See Tatom, 228 F.3d at 931.

Again, plaintiff has failed to make a prima facie case. Removal from the diversity team is not an adverse emploYment action. An adverse employment action is a tangible change in working conditions that produces a material emploYment disadvantage. See Fisher v. Pharmacia & Upiohn, 225F.3d915, 919 (8thCir. 2000) (ADEAcase); Spears v. Missouri Dep't of Corrections and Human Resources, 210 F.3d 850, 853 (8th Cir. 2000) (Title VII case). "Termination, reduction in pay or benefits, and changes in employment that significantly

affect an employee's future career prospects meet this standard, see Kerns v. Capital Graphics. Inc., 178 F.3d 1011, 1016 (81b Cir. 1999), but minor changes in working conditions that merely inconvenience an employee or alter an employee's work responsibilities do not, see Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997)." Spears, 210 F.3d at 852. Hamilton has no evidence that removal from the Diversity Team changed any of his working conditions. Membership on the Diversity Team was not a required work activity. The number of Diversity Team members was reduced from thirteen to seven. Only two members remained after the restructuring. Hamilton was one of eleven people removed from the Team and he has no evidence that the two remaining members were similarly situated employees treated more favorably than he was or that there was age discrimination. Also, additional requirements for team membership were adopted after the restructuring and Hamilton did not meet those requirements.6 Therefore, summary judgment will be entered in favor of defendant on plaintiff's claim of age discrimination in his removal from the Diversity Team.

6 After the restructuring, Enterprise required that all Diversity Team members be Level II employees, obtain a recommendation from their managers, and receive "meets requirements" or better on their most recent evaluations. (Weiss Aff. <J[19).

5. Forced Termination

To demonstrate constructive discharge, a plaintiff

must show the employer "deliberately made or allowed [his] working conditions to become so intolerable that the employee had *no other choice* but to quit." Jones v. Fitzgerald, 285 F.3d 705,715-16 (8th Cir. 2002) (emphasis in original) (citation and internal punctuation omitted). To be liable, the employer must have intended to force the employee to quit, or at least have reasonably foreseen the employee's resignation as a consequence of the unlawful working conditions it created. Jackson v. Arkansas Dep't of Educ.. Voc. & Tech. Educ., 272 F.3d 1020, 1026 (8th Cir. 2001), cert. denied, 122 S. Ct. 2366 (2002). Furthermore, the employee 'must also show that a reasonable person, from an objective viewpoint, would find the working conditions intolerable. Id. at 1027. A plaintiff must take affirmative steps short of resigning that a reasonable employee would take to make his conditions of employment more tolerable. See Jones, 285 F.3d at 716. "To act reasonably, an employee has an obligation not the assume the worst and not to jump to conclusions too quickly." Tidwell v. Meyer's Bakeries. Inc., 93 F.3d 490,494 (8th Cir. 1996)

On March 2, 2004, Chad Kavanaugh issued plaintiff a performance memorandum. In this memorandum, Kavanaugh stated that Hamilton was being placed on probation for ninety days. (Defs. Ex. G). The memorandum cautioned that if Hamilton failed to meet or surpass the group's fiscal year average or received any additional complaints from customers or colleagues, disciplinary action would be taken up to and including termination. Id. Hamilton was verbally given the option

to resign with five weeks severance pay. (pls.'s Dep. p. 110:18-21 and Def.'s Ex. D). Hamilton chose to resign, but did not sign the severance agreement. Enterprise paid Hamilton the severance pay.

Hamilton has no evidence that Enterprise "deliberately made or allowed [his] working conditions to become so intolerable that [he] had *no other choice* but to quit." Jones, 285 F.3d at 715-16. Hamilton does not submit any evidence about what made his working conditions intolerable or how Enterprise created intolerable working conditions. The evidence shows that any problems with Hamilton's working conditions were created by Hamilton. Hamilton admits that customers and other employees made several complaints about his job performance over a period of several months. Hamilton was placed on probation and given the option of resigning with severance pay if he did not want to be on probation. There is no evidence that Enterprise forced Hamilton to resign. Further, Hamilton has not shown any affirmative steps that he took to make his conditions of employment more tolerable. Therefore, Hamilton's assertion that he was constructively discharged is without merit and summary judgment will be entered for Enterprise on this claim.

C. Section 1981- Reverse Discrimination Claim

"The purpose of 42 U.S.C. § 1981 is to prohibit discrimination in the performance, modification and termination of contracts and to protect the enjoyment of

all benefits, privileges, terms, and conditions of the contractual relationship. 42 U.S. C. § 1981 (b)." Williams v. Lindenwood University, 288 F.3d 349,355 (8th Cir. 2002) (internal quotations omitted). In analyzing intentional discrimination under § 1981, the standards used in Title VII claims are applied. Reedv v. Ouebecor Printing Eagle. Inc., 333 F.3d 906,907 (8th Cir. 2003) (citing Ross v. Kansas City Power & LilZht Co., 293 F.3d 1041, 1050 (8th Cir. 2002)). The statute of limitations for § 1981 claims is four years and Hamilton may assert claims for actions that occurred within four years prior to filing this lawsuit. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004); Jackson v. Homechoice. Inc., 368 F.3d 997,999 (8th Cir. 2004).

In Hamilton's § 1981 claim, he asserts the same discriminatory actions as listed in his *ADEA* claim: (1) failure to promote, (2) denial of study materials for the MA Test, (3) denial of opportunit) to take t[illegible] MA test, (4) removal from the Diversity Team, and (5) forced termination. To establish a prima facie case of reverse racial discrimination regarding promotions, the plaintiff must show that he is white, he applied for and was qualified for an open position, he was rejected for that open position, and his employer hired someone of a minority race. Hammer v. Ashcroft, 383 F.3d 722 724 (8th Cir. 2004) (citing Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997». Plaintiff must also show "background circumstances [that] support the suspicion that the defendant is the unusual employer who

discriminates against the majority." Hammer, 383 F.3d at 724 (citations omitted).

As with his ADEA claims, Hamilton has failed to make a prima facie case. As articulated earlier, plaintiff was not qualified for any open position. Hamilton had not taken the MA test. Hamilton could not take the MA test because he did not work in the rental division. Further, Hamilton has no evidence of background circumstances that would show that Enterprise is the unusual employer who discriminates against the majority. Hamilton's § 1981 claim of reverse race discrimination regarding promotions is without merit. Summary judgment will be entered for Enterprise on this claim.

Likewise, Hamilton's claims that he was not allowed to take the MA test or provided with MA study materials because of reverse racial discrimination fails as well. In his deposition, Hamilton states without any support that if he were black or nonwhite, he would have been given the stud) materials. (Hamilton Dep. 46:12-15). Hamilton also testified that "every employee that was a minority was promoted before me. . . and that had to do with minority or non-minority." (Hamilton Dep. 12:10-20). Hamilton also testified, "If a minority was promoted before me, I took that as – a younger minority individual, male or female -- I took that as an issue of race, yes, I did." (Hamilton Dep. 13:2-5). Hamilton has no evidence that a minority Level I callback center employee or any other

Level I callback center employee was provided with study materials for the MA test or allowed to take the MA is without merit and summary judgment will be granted in favor of Enterprise on this claim.

Next, the Court will address Hamilton's claim regarding removal from the Diversity Team. In his complaint, Hamilton states that he was "terminated from Group 01 Diversity Team and Career/Family Focus Group [and was told] he was an "embarrassment to Enterprise Rent-A-Car for being a 5 year level 1 employee and not being promoted." (Compl.9). The complaint asserts that this action was discrimination based on Hamilton's race. (Comp. 10). In his deposition, Hamilton was asked if it was his position that if he were not white, he would not have been removed from the diversity team. (Hamilton Dep. p. 15:15-18). Hamilton responded,

> I don't know that so much to be the truth. They wanted an older person. They were trying to fill individuals that represented different segments of a diversified employment structure within the Enterprise system. I was an older person and consequently I was a level one five-year employee they had passed over, for whatever the reasons were, and then I was an embarrassment to them and I was removed. Be it black, white, red, green, or purple, that was how I took it at that time. And I still stand on that belief today.

(Hamilton Dep. 15:19-25-16:1-4). In his preemptive

memorandum in opposition to summary judgment, Hamilton asserts that Hoeferlin asked him for advice regarding a potential discrimination suit brought by a black female employee, Tammy Buford, who was a troublemaker and had not been promoted. (Hamilton Dep. p. 59: 1-8). Hamilton alleges that Hoeferlin wanted to know if Hamilton should give Buford a promotion because she might file a lawsuit. (Id.) Hamilton asserts that this behavior is evidence that Enterprise management discriminated "against [him] and other employees who were disliked." Hamilton's claims are without merit. Hamilton's discussion with Hoeferlin is not evidence of discrimination because it is not illegal for a company to deny promotions to or terminate employees because management dislikes them for non-illegal reasons. Further, in his deposition, Hamilton first states that race was part of his removal from the diversity team and then states that he was removed because Enterprise was embarrassed that he was still a level one employee for five years regardless of his race. (Hamilton Dep. 15:12-25-16:1-4). As discussed above on plaintiffs ADEA claim, the diversity team was restructured and its membership reduced, and only. two of the original thirteen members remained after the restructuring. Hamilton has no evidence that would suggest that his removal from the Diversity Team was based on his race. The Court will enter summary judgment in favor of

Enterprise on this claim.

Finally, plaintiff cannot assert that he was constructively discharged because of reverse racial discrimination. As previously discussed, Hamilton has not identified any intolerable working conditions created by Enterprise. Being placed on probation alone is not an intolerable working condition. In his deposition, plaintiff details how his problems with other employees and customers were caused by Enterprise Manager Teresa Shriver's displeasure that a particular program was set up in St. Louis rather than Kansas City. (Hamilton's Dep. 82:6-25-85: 1-25). Hamilton does not have any evidence that Shriver's "prejudice" against him was due to his race. (Hamilton Dep. 86:23-25 87:1-9). Therefore, the Court will enter summary judgment in favor of Enterprise on this claim. None of Hamilton's claims show background circumstances that would support the position that Enterprise is the unusual employer who discriminates against the majority. Plaintiffs claimsunder § 1981 fail as a matter of law and judgment will be entered in favor of Enterprise on these claims.

IV. Motion for Sanctions

Enterprise seeks sanctions against Hamilton for disclosing confidential information from the unsuccessful

mediation held in this case. Hamilton opposes the motion asserting that his actions were unintentional because he believed that the session was only confidential if a settlement were reached in this case. In his preemptive memorandum in opposition to defendant's motion for summary judgment, Hamilton disclosed the amount Enterprise offered him during the mediation. Local Rule 6.04 states, "All written and oral communications made or disclosed to the neutral are confidential and may not be disclosed by the neutral, any party, or other participant, unless the parties otherwise. agree in writing." B.D. Mo. L.R. 6.04. The Order Referring Case to Alternative Dispute Resolution stated that the case would be governed by Local Rules 6.01-6.05. See Order of March 9,2005.

The Court does not believe that the plaintiff's disclosure warrants sanctions. Therefore, the Court will deny defendant's motion for sanctions.

VI. Conclusion

In conclusion, for the foregoing reasons, the Court will enter summary judgment in favor of defendant Enterprise on plaintiff's claims under the ADEA and 42 V.S.C. § 1981 and will deny defendant's motion for sanctions.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is **GRANTED**. [Doc. 45]

IT IS FURTHER ORDERED that defendant's motion for sanctions is DENIED. [Doc. 48]

An appropriate judgment will accompany this memorandum and order.

CHARLES A. SHAW

_____

/s/ Charles A. Shaw
UNITED STATES DISTRICT JUDGE

Dated this 17th day of October, 2005.

APPENDIX B.

6 PAGES

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse] I] South 10th Street, Room 24.329
St. Louis, Missouri 63102
Michael E. Gans *Clerk of Court*
VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.go\.

January 10, 2007

Mr. Rad W. Hamilton
1353 Nykiel Court
Manchester, MO 63011-0000

RE: 05-4098 Rad W. Hamilton v. Enterprise Leasing

Dear Mr. Hamilton:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 1O:00a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note

particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. No grace period for mailing is allowed, and the date of the postmark is irrelevant. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans, Clerk of Court

srd
-Enclosure{S)

cc: Mr. Josef S. Glynias,
Mr. Randall S. Thompson
Mr. James G. Woodward

District Court/Agency Case Number(s): 4:04-CV-802 CAS

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-4098

Rad W. Hamilton,

Appellant, ----

V.

Appeal-from the Unite<i States District Court for the Eastern District of Missouri.
[UNPUBLISHED]

Enterprise Leasing Company of St. Louis,

Appellee.

Submitted: January 5, 2007
Filed: January 10, 2007

Before MURPHY, BYE, and MELLOY, Circuit Judges.

PER CURIAM.

Rad W. Hamilton appeals the district court'sl dismissal of some claims, and its adverse grant of summary judgment on his remaining claims, in his employment discrimination lawsuit. Having conducted de novo review, we affirm the district court's well-reasoned decisions. See 8th Cir. R. 47B. We deny the pending

motion.

---

1 The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

No: 05-4098

Rad W. Hamilton,

Appellant

v.

Enterprise Leasing Company of St. Louis,

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis (4:04-CV -802 CAS)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 10, 2007

Order Entered in Accordance with Opinion: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 05-4098

Rad W. Hamilton,
Appellant

v.

Enterprise Leasing Company of St. Louis,
Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis (4:04-CV-802 CAS)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this court.

January 10,2007

Order Entered in Accordance with Opinion: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

8 PAGES

HOW TO SEEK ASSISTANCE

The St. Louis District of EEOC seeks to ensure that anyone who wants to file a charge of employment discrimination is able to do so. We understand that filing a charge may appear to be made difficult by the necessity to answer a lot of questions, such as those contained in the attached *form.* Please understand there are no right or wrong answers. Simply answer the questions as briefly as possible. At the appropriate time, you will have the opportunity to speak with an investigator and provide more information as needed.

As a means of ensuring that you are able to communicate your concerns to our office, we will provide assistance to you in completing the attached questionnaire, should you find it too difficult or too lengthy, or are unable to complete it for any reason. If you need assistance in completing the questionnaire, please can Inez Shiloh at 314-539-7846. If she is unavailable at the time you call, please leave your name and a number where you may be reached during business hours on her voice mail, and she will return your call as quickly as possible.

If you prefer, you may mail this *form* to us after completing the information outlined below, and the Customer Service staff will call you upon receiving this *form.* Our Customer Service staff will help you complete the form, and then give it to an investigator for review.

Usually within two weeks, an investigator will call you to conduct an interview. At that time, the investigator will advise you how your charge will be processed by EEOC, should you decide to file. You always have a right to file a charge, although EEOC may not investigate it beyond the interview stage.

PLEASE UNDERSTAND THAT REQUESTING ASSISTANCE WILL NOT PROCESS YOUR COMPLAINT SOONER. MS. SHILOH IS ONLY AVAILABLE TO ASSIST YOU IN COMPLETING THE QUESTIONNAIRE. YOUR QUESTIONNAIRE WILL STILL BE ASSIGNED TO AN INVESTIGATOR WHO WILL CONTACT YOU WITHIN TWO TO THREE WEEKS TO BEGIN THE INVESTIGATIVE PROCESS.

TO CUSTOMER SERVICE STAFF:

I NEED HELP COMPLETING MY QUESTIONNAIRE. PLEASE CALL ME AT THE NUMBER IDENTIFIED BELOW.

Name Rad W. Hamilton Phone no: 636-227-1439
I can be reached between 6:00 A and 9:30 P
Street Address 1353 Nykiel Court
City,State,Zip Manchester Missouri 63011

INSTRUCTIONS

Be Sure You Date and Sign the Questionnaire on the Last Page.
Return this questionnaire along with copies of your documents, if any, which support your allegations.
You may also use additional sheets of paper as necessary.
Everyone Must Complete Section A. Pages 1.2 and 3.

- If your allegation relates to Hiring or Promotion. you should also complete Section B. page 3.
- If your allegation relates to Disabilitv discrimination, you should also complete Section C. page 4.
- If your allegation relates to Religious discrimination, you should also complete Section D. page 5.
- If your allegation relates to Harassment. you should also complete Section E. page 5 and 6.
- If your allegation relates to Retaliation. you should also complete Section F. Due 6.

A. BACKGROUND INFORMATION

280-2004-03126N

Rad Hamilton
1353 Nykel Cour
Manchester, MO 63011

Home Phone 636-227-1439
Gender: Male
Race: White
Age: 61 Date of Birth 10-15-42 SS# 463-64-1702
I can best be contacted on 7 anytime days of the week
I may not x be contacted at work... asked to leave Enterprise.

Please provide the following information for a person at a different address whom we can contact if we are unable to reach you.
Name Karen Schumacher Telephone 314-962-2282 X118
Address 9005 Watson Rd. City STL State MO Zip

Identify the name of the organization that you believe discriminated against you:

X An Employer
Name of Organization Enterprise Rent-A-Car
Address of the Organization 600 Corporate Park Drive
City St. Louis State MO ZIP 63105 County Clayton
Telephone No. 314-512-5000 # of Employees 54,000
Type Business Car Rental
Date of Hire 10-26-98
Job Title Call Back Rep Date Job Ended March 3, 2004

Have you filed a charge of employment discrimination about the problems you are raising in this questionnaire with any of the following organizations?

Missouri Commission on Human Rights NO
St. Louis Civil Rights Enforcement Agency NO
Illinois Department of Human Rights NO
Kansas Human Rights Commission NO
Kansas City Human Relations Dept. NO

INSERTED STATEMENT HERE:
FILED MISSOURI COMMISSION ON HUMAN RIGHTS SEPTEMBER 13, 2004 (HAVE LETTER) RECEIVED "NOTICE OF RIGHT TO SUE LETTER FROM EEOC ON JUNE 16, 2004

In your own words, briefly describe what happened to you that you believe to be discriminatory:
Keith Hoeferlin stated , "your to old and too slow," Matt is young and I've seen him whip through the extensions and claims so fast!" My "MA" test was cancelled 5 times to prevent me from getting promoted. All 9 positions I applied for I'm told I don't qualify for anything!

At the time of the incident what was your job title? Call

Back Rep
Who was your supervisor? Catrice Mooney
How long had you been in that job? 4 years

Do you think this happened to you because of your
Age (40 & over (X) X indicates yes box checked.
Retaliation (X) x indicates yes box checked.

Do you know of anyone who was treated more favorably than you in a similar situation? Yes box was checked (X)
If yes, please provide the following information:

Name of Individuals	Job Title of Individuals
1. Matt Carlson	In House Rep

Have you attempted to resolve this matter with management or your union Yes (X) X indicates yes box checked.
If yes, with whom?
Name Jeff Weiss HR Mgr, Dan Decker, Title Grp Rental Mgr. And Chad Kavanaugh Grp Rntl Mgr.
Please explain what happened. They did nothing to resolve this matter in four (4) years.
What was the reason given to you for the action taken? It's up to me! That's all that was said.

Are you aware of statements made by management officials showing prejudice toward you for any of the following reasons:

Age box (X) checked
Retaliation box (X) checked

Please describe any such statements as follows:
What were the statements? Continued issues of not

qualified for any position without passing "MA" test cancelled 5 times.
Who made them? Jeff Weiss
When were they made? Last four years
Where were they made? On the job 29 Hunter Ave STL
Who witnessed these statements being made? All HR Personnell

B. HIRING/PROMOTION

For what position did you apply? 9 different positions
How did you learn of this position? Through postings & Email
What were the qualifications required for this position? Be in good standing, an a "MA" or higher!
Explain how you met the qualifications. Must take a grill test after study of material.
When did you learn that you were not selected? 4 days after each position.
What reason were you given for not being selected? Not Qualified.
What do you believe was the reason you were not selected? AGE!
Why do you believe this was the reason? I'm the only 61 year old level 1 at Enterprise.
Who was selected? Provide the name, race, sex, age, religion, or national orgin of the person selected. Matt Carlson, 25?, White, Male.

D. RELIGIOUS ACCOMMODATION

What is your religion? Baptist

F. RETALIATION

Retaliation under EEOC law is when your employer takes a negative employment action against you because you

protested an activity made unlawful by EEOC laws, you filed a charge of employment discrimination with EEOC, or you participated in an EEOC investigation of employment discrimination. Do you believe that you were discriminated against in retaliation for any of these activities. YES (X) box was checked.
When did you complain? Last 4 years To whom did you complain? Jeff Weiss, Chad Kavanaugh.
About what did you complain? Not being qualified w/a Ph.D. in Psychology!
How did you complain? In writing & I have every copy of letters.
What harm did you experience as a result of your complaint? Told I was a disgruntled employee and asked to leave Enterprise March 1, 2004 would give me 5 weeks pay and waive all my rights to "ADEA of 1976"!!!

Signature _____
/s/ Rad W. Hamilton
Date _____
3-9-04

PRIVACY ACT STATEMENT: This *form* is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal , data and the uses thereof are:

FORM TITLEIDA TE. Charge Questionnaire (12/97).

AUTHORITY. 42 V.S.C. § 2000e-5(b), 29 V.S.C. § 211, 29 V.S.C. § 626. 42 V.S.C. 12117(a)

PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information in an acceptable form consistent with statutory requirements to enable the Commission to act on matters within its jurisdiction. When this form constitutes/the only timely written statement of allegations of employment discrimination, the Commission will, consistent with 29 CFR

160 1.12(b) and 29 CFR] 626.8(b), consider it to be a sufficient charge of discrimination under the relevant statute(s).

ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence off acts relevant to a decision as to whether the Commission has jurisdiction over allegations of employment discrimination and to provide such charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. Information may also be disclosed to charging parties in consideration of or in connection with litigation.

WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.

APPENDIX D

SEPARATION AGREEMENT AND RELEASE

THIS SEPARATION AGREEMENT AND RELEASE ("agreement") is made and entered into this 3rd day of March, 2004, by and between Enterprise Leasing Company of St. Louis, a Missouri corporation ("Enterprise"), and Rad W. Hamilton ("Employee").

Recitals

WHEREAS, it is the desire of the parties, among other things, to state the final terms and conditions of the severance of their employment relationship, and to provide for payments to employee in exchange for his undertakings below.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein set forth, and for other good and valuable consideration, the receipt and the sufficiency of which hereby are acknowledged, the parties hereto agree as follows:

1. Employee hereby tenders, and Enterprise accepts, his voluntary resignation of employment effective March 2, 2004, upon which date Employee shall cease being an employee of Enterprise.
2. Employee shall receive, from Enterprise, all regular salary and monthly bonus payments due him through March 2, 2004, in accordance with Enterprise's regular salary and monthly bonus payment schedule.
3. Effective March 3, 2004, all salary, benefits and perquisites related to Employee's employment by

Enterprise shall completely cease, except as otherwise expressly provided herein. Except as specifically required pursuant to this Agreement, no payment of whatsoever nature shall be due from Enterprise to Employee after March 2, 2004.

4. Enterprise will continue to permit Employee to participate, subject to terms and conditions of applicable employee benefit plans, in all medical and dental benefits currently provided through March 13, 2004, after which date all such coverage shall cease. Employee shall be provided an option to continue such coverage after March 13, 2004, in accordance with existing lax.
5. Any vested interest held by Enterprise Profit Sharing and/or 401(k) Plans shall be distributed in accordance with the terms of the plans and applicable law. Employee shall not be a participant in such plans after March 2, 2004, and shall not be entitled to any further contribution for any period of time after March 2, 2004.
6. In consideration for Employee's execution of this Agreement, Employee shall receive a total payment of Four Thousand Sixty Dollars ($4,060.00), less standard payroll deductions. Payment s of this amount will be made in conjunction with the customary payroll schedule for all employees at Enterprise on or about March 12, 2004. Employee shall receive Two Thousand Sixty-Eight Dollars and Eighty Cents ($2,068.80), less standard payroll deductions, as payment for unused vacation days. Payment of this amount will be made in conjunction with the customary payroll schedule for all employees at Enterprise on or about March 12, 2004.

7. For and in consideration of the foregoing, Employee releases Enterprise, and each past or present officer, director, agent, employee, shareholder, insurer, parent and affiliate of the corporation, including, but not limited to, THE CRAWFORD GROUP, INC. and ENTERPRISE RENT-A-CAR COMPANY, a Missouri corporation, and all of the past and present officers, directors, agents, employees and shareholders of such affiliated or parent corporation, from any and all claims, made, to be made, or which might have been made of whatever nature, whether known or unknown, from the beginning of time, including those that arose as a consequence of his employment by Enterprise, or arising out of the severance of such employment relationship, or arising out of any act committed or omitted during or after the existence of such employment relationship, all up through and including the date of this (Agreement, including, but not limited to, those which were, could have been or could be the subject of an administrative or judicial proceeding filed by Employee or on his behalf under federal, state, or local law, whether by statute, regulation, in contract or tort, and including, but not limited to, every claim for front pay, back pay, wages, bonus, service letter, fringe benefits, any form of discrimination (including but not limited to, every claim of race, color, sex, religion, national origin, disability or age discrimination), wrongful termination, wrongful or retaliatory discharge, public violation, whistleblower, interference with contract, intentional or negligent infliction of emotional distress, pain and suffering, breach of

contract, defamation, libel, and/or slander, compensatory or punitive damages, interest, attorney's fees, reinstatement or reemployment.

8. By execution of this Agreement, Rad W. Hamilton expressly waives any and all rights or claims arising under the Age Discrimination in Employment Act of 1967 (the "ADEA"), and:
    a. Rad. W. Hamilton acknowledges that his waiver of rights or claims arising under the ADEA is in writing and is understood by him;
    b. Rad W. Hamilton expressly understands that this waiver refers to right or claims arising under the ADEA;
    c. Rad W. Hamilton expressly understands that by execution of this document, Rad W. Hamilton does not waive any rights or claims under the ADEA that may arise after the date the waiver is executed;
    d. Rad W. Hamilton acknowledges that the waiver of his rights or claims arising under the ADEA is in exchange for the consideration payable to him under this agreement, which is substantially above and beyond that to which he is otherwise entitled except for this Agreement;
    e. Rad W. Hamilton acknowledges that Enterprise expressly advised Rad W. Hamilton to consult with an Attorney of his choosing prior to executing this Agreement;
    f. Rad W. Hamilton has been advised by Enterprise that he is given a period not less than twenty-one (21) days from the date he is presented with this Agreement within

which to consider this Agreement;

g. Rad W. Hamilton acknowledges that Enterprise has advised him that he is entitled to revoke his waiver of rights or claims arising under the ADEA within seven (7) days after executing this Agreement and that said waiver will not and does not become effective or enforceable until the seven (7) day revocation period has expired;

h. Rad W. Hamilton understands that this waiver is not requested in connection with an exit incentive or other employment termination program;

i. Rad W. Hamilton acknowledges that Enterprise shall have no liability to Rad W. Hamilton for any sum or benefit to be paid under this Agreement until the expiration of the seven (7) day revocation period referenced in subparagraph (g) above, notwithstanding any other provision of this Agreement to the contrary; and

j. If Rad W. Hamilton exercises his right to revoke, as referred to in subparagraph (g) above, this Agreement shall be null and void and of no force or effect and all rights and obligations of the parties hereunder shall be cancelled and voided.

9. If any court rules that such waiver of rights to file, or have filed on his behalf, any administrative or judicial charges or complaints is ineffective, Employee agrees not to seek or accept any money damages or any other form of relief upon the

filing of any such administrative or judicial charges or complaints.

10. None of the terms and conditions of this Agreement (including any negotiations leading hereto) either have been or shall be made public by Employee or be disclosed by him to any person other than his immediate family, accountant and/or other financial advisor and attorney, or as may be required by valid court order, without the express prior written consent of Enterprise. To the extent Employee reveals either the existence or the terms of the Agreement to such persons, Employee will advise them that they must not divulge the terms of this Agreement and that the terms are considered confidential. Employee further acknowledges and agrees that Employee is strictly and personally liable to Enterprise for any violation of this confidentiality provision by such third party.
11. Employee shall not disparage or denigrate in any manner Enterprise, its products or services, or any Enterprise employee, agent, officer, shareholder, director, or any family member of any such employee, agent, officer, shareholder, or director.
12. This Agreement constitutes the entire agreement between Employee and Enterprise concerning the subject matters hereof and supersedes and replaces any and all other understandings, obligations, representations and/or agreements, whether written or oral, express or implied, between Employee and Enterprise. Neither this Agreement nor any of its terms may be amended, modified or waived except in writing duly executed by the parties hereto.
13. This Agreement shall be governed by and

constructed according to the internal laws of the State of Missouri without reference to conflict of law principles.

14. Employee shall inform Enterprise of his current mailing address and any subsequent changes thereto until all payments required under this Agreement have been provided by Enterprise to Employee.
15. Should it be determined by Enterprise, at its sole determination, that Employee has breached any term of this Agreement, all remaining payments payable by Enterprise under this Agreement will cease, and Enterprise shall be excused from performance of any and all other obligations contained in this agreement. The election to cancel and cause future payments shall not preclude Enterprise from requesting all other remedies, either at law or equity, or otherwise preclude a court of competent jurisdiction from awarding any other remedy, either at law or equity, including, but not limited to, restitution, court costs, and attorney's fees.
16. This Agreement and the various rights and obligations arising hereunder shall benefit and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.
17. Nothing contained in this Agreement shall be construed to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this Agreement and any present or future statute, law, governmental regulation or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event, the affected

provisions of this Agreement shall be curtailed and restricted only to the extent necessary to bring them within legal requirements.

18. If Employee contests the enforceability or applicability of this Agreement, or any part hereof, and if such challenge by Employee is sustained in whole or in part, then Enterprise, at its sole option, may cancel this Agreement upon written notice to Employee and any and all sums previously paid by Enterprise to Employee hereunder shall be repaid by Employee to Enterprise, within thirty (30) days of such written notice.
19. Employee hereby acknowledges and agrees that he has read this agreement; that he has had a reasonable period for deliberation and fully understands and knowingly accepts all of its terms of his own free will and volition.

This Agreement was altered and revised in its entirety on March 3, 2004 with multiple deletions, alterations, and or revisions thus rendering this Agreement null and void. This was Enterprise's way of a FORCED RESIGNATION to receive a payment of $4,060.00!

Rad W. Hamilton

/s/ Rad W. Hamilton

Dated March 3, 2004

No. 06-1239

APR 17

In The

Supreme Court of the United States

RAD W. HAMILTON,

Petitioner,

v.

ENTERPRISE LEASING COMPANY OF ST. LOUIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RANDALL S. THOMPSON
Counsel of Record

JOSEF S. GLYNIAS
BLACKWELL SANDERS PEPER MARTIN, LLP
720 Olive Street, Ste. 2400
St. Louis, Missouri 63101
Telephone: (314) 345-6000
Facsimile: (314) 345-6060

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

To the extent any of the questions presented by Petitioner are sufficiently intelligible or state any issues to be resolved on appeal, they do not form a valid basis for review by this Court. Moreover, Petitioner overstates the purported issues in the hope of creating some reason for this Court to grant review. To the best of Respondent's ability to determine, Petitioner alleges the following question presented:

Whether the United States Court of Appeals for the Eighth Circuit erred in affirming the District Court's grant of Respondent's motions to dismiss and for summary judgment on Petitioner's claims for sex, age, national origin and reverse race discrimination.

In the event this Court determines that Petitioner has raised other questions for review, Respondent respectfully reserves and requests the opportunity to respond to those questions.

CORPORATE DISCLOSURE STATEMENT

Enterprise Leasing Company of St. Louis is a wholly-owned subsidiary of Enterprise Rent-A-Car Company, a Missouri corporation. Enterprise Leasing Company of St. Louis has no subsidiaries not wholly-owned, and there is no publicly-held company that owns 10% or more of the stock of Enterprise Leasing Company of St. Louis.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. PETITIONER HAS FAILED TO IDENTIFY HOW THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH ANY RULINGS OF THIS COURT OR ANY COURTS OF APPEALS	5
II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER'S ALLEGATIONS FAILED TO STATE A CLAIM AS A MATTER OF LAW	8
A. Several of Petitioner's allegations of employment discrimination were either untimely or had not been exhausted through the administrative process and thus are prohibited as a matter of law	8
1. Petitioner failed to exhaust his administrative remedies with respect to several allegations of race, sex, and national origin discrimination under Title VII	8

TABLE OF CONTENTS – Continued

Page

2. *Petitioner also failed to exhaust his administrative remedies with respect to several allegations of age discrimination under the ADEA that occurred more than 300 days prior to the date of his charge questionnaire* 10

3. *The District Court and the Eighth Circuit further properly held that Section 1981 does not encompass Petitioner's claims for alleged sex, age and national origin discrimination* 12

B. Petitioner's remaining, timely allegations of age discrimination fail. Petitioner admitted that he failed to meet necessary qualifications for advancement, and he admitted that his age was not a factor in his resignation..... 13

1. *An alleged ageist statement from Petitioner's former supervisor cannot stand as direct evidence of age discrimination because it was a stray remark and allegedly occurred three years before the conduct at issue* 14

2. *Petitioner cannot establish a prima facie case of age discrimination for failure to promote because he admitted he was not qualified for the position, no similarly situated employee outside of his protected group was given the position, and he cannot refute Respondent's legitimate, nondiscriminatory reasons for its actions*..... 17

TABLE OF CONTENTS – Continued

Page

3. Petitioner cannot establish a prima facie case of age discrimination against Respondent for not allowing him to take the MA test or providing him study materials because Petitioner was not qualified to take the test or receive the study materials 20

4. Petitioner's removal from the diversity team was not an act of unlawful discrimination because it was not an adverse employment action that presented any tangible change in working conditions or produced any material employment disadvantage 22

5. Petitioner's claim for constructive discharge also must fail because he failed to show either that his working conditions were intolerable or that he took any steps to make those conditions more tolerable 23

C. Finally, Petitioner's claim of reverse race discrimination also fails as a matter of law. Petitioner lacks any evidence that Respondent discriminated against him because he is Caucasian 26

CONCLUSION 30

RESPONDENT'S APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Block, 807 F.2d 145 (8th Cir. 1986) 9

Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311 (8th Cir. 1996) 16

Bradley v. Widnall, 232 F.3d 626 (8th Cir. 2000) 25

Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151 (8th Cir. 1999) 13, 14, 18, 21, 25

Briley v. Carlin, 172 F.3d 567 (8th Cir. 1999) 10

Burlington N. and Santa Fe Ry. v. White, 126 S.Ct. 2405 (2006) 6, 7

Calder v. TCI Cablevision of Mo., 298 F.3d 723 (8th Cir. 2002) 20

Cobb v. Stringer, 850 F.2d 356 (8th Cir. 1988) 9

Cooney v. Union Pac. R.R. Co., 258 F.3d 731 (8th Cir. 2001) 29

Dorsey v. Pinnacle Automation Co., 278 F.3d 830 (8th Cir. 2002) 10, 11

Dring v. McDonnell Douglas Corp., 58 F.3d 1323 (8th Cir. 1995) 11

Duffy v. Wolfe, 123 F.3d 1026 (8th Cir. 1997) 27

EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988) 9

Fisher v. Pharmacia & Upjohn, 225 F.3d 915 (8th Cir. 2000) 22

Gartman v. Gencorp, Inc., 120 F.3d 127 (8th Cir. 1997) 15

TABLE OF AUTHORITIES – Continued

Page

Griffin v. Pinkerton's, Inc., 120 F.3d 127 (8th Cir. 1999) 12

Griffith v. Carlin, 755 F.2d 1516 (11th Cir. 1985) 9

Hammer v. Ashcroft, 383 F.3d 722 (8th Cir. 2004) 27

Harlston v. McDonnell Douglas Corp., 37 F.3d 379 (8th Cir. 1994) 19, 21

Higgins v. Gonzales, Case No. 06-2556, 2007 WL 817505 (8th Cir., Mar. 20, 2007) 21, 22, 28

Howard v. Burns Bros., Inc., 149 F.3d 835 (8th Cir. 1998) 25

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 15

Jones v. Fitzgerald, 285 F.3d 705 (8th Cir. 2002) 24

Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369 (2004) 26

Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040 (8th Cir. 2005) 18

Ledergerber v. Stangler, 122 F.3d 1142 (8th Cir. 1997) 21

Marquez v. Bridgestone/Firestone, Inc., 353 F.3d 1037 (8th Cir. 2004) 28

McDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976) 12

Miller v. Runyon, 32 F.3d 386 (8th Cir. 1994) 10

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 11, 17

Phillips v. Taco Bell Corp., 156 F.3d 884 (8th Cir. 1998) 24

TABLE OF AUTHORITIES – Continued

Page

Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr., 133 F.3d 616 (8th Cir. 1998) 16

Runyon v. McCrary, 427 U.S. 160 (1976) 12

Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987) 12

Saulsberry v. St. Mary's Univ. of Minn., 318 F.3d 862 (8th Cir. 2003) 27

Shannon v. Ford Motor Co., 72 F.3d 678 (8th Cir. 1996) 9

Simmons v. OCé-USA, Inc., 174 F.3d 913 (8th Cir. 1999) 16

Spears v. Mo. Dep't of Corr. and Human Res., 210 F.3d 850 (8th Cir. 2000) 21, 24

Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106 (8th Cir. 2001) 16

Walton v. McDonnell Douglas Corp., 167 F.3d 423 (8th Cir. 1999) 15

Williams v. Little Rock Mun. Water Works, 21 F.3d 218 (8th Cir. 1994) 9

Yates v. McDonnell Douglas, 255 F.3d 546 (8th Cir. 2001) 15

FEDERAL STATUTES

23 U.S.C. §621 4

42 U.S.C. §1981(a) 4, 12, 13, 26, 27

42 U.S.C. §2000e 4

42 U.S.C. §2000e-5(e)(1) 9

STATEMENT OF THE CASE

Respondent hired Petitioner, a white male, at the age of fifty-six. *See* Petitioner's Appendix at page 34, hereinafter referred to as "PA at __". He started in the entry level position in the rental division of Respondent, which includes the familiar stand-alone facilities where customers rent or lease vehicles. *Id.* In November 1999, Petitioner requested a leave of absence, which Respondent granted. *Id.* Respondent also provided Petitioner with a $3,000 loan at that time. *Id.* at 35. Upon his return in January 2000, Petitioner was offered a similar available position in the rental division, which he declined because he felt it was too far away from his home. *Id.* Petitioner opted to return to an available entry level position in the callback division of Respondent. *Id.*

Petitioner thereafter unsuccessfully sought many rental division manager promotions during his employment with Respondent. He argues that he was not promoted or given the opportunity to take an internal test – called the MA test – which makes one eligible for promotion to a higher level position. PA at 35-36. Petitioner was always told that to be promoted to rental division manager he had to go back to the rental division to obtain the necessary skills and experience, which was a requirement to be able to take the MA test and be promoted to a rental division manager position. *Id.* Nevertheless, Petitioner flatly refused to return to the rental division. *Id.*

No entry level callback division employee has been allowed to take the MA test or been promoted directly into a rental division manager position, both facts that Petitioner freely admitted. PA at 35-36. Consequently, Petitioner does not allege that any younger employees in the

callback division were treated more favorably than he was. *Id.* at 35. Petitioner does not allege that any entry level callback center employee was provided study materials for the MA test. *Id.* at 36.

Petitioner sought only one promotion within the year prior to the date he filed his charge questionnaire against Respondent on March 9, 2004. *Id.* at 36. That position, as all others that were available during the year prior to the date Petitioner filed his questionnaire, was filled by an individual who had passed the MA test and was working in the rental division. *Id.* at 36-37.

Petitioner alleges that during a conversation in March 2001, Keith Hoeferlin (his supervisor at that time) told him that he was too slow and a younger colleague was faster and "can whip through call backs faster." PA at 40. Respondent investigated the claim and found no evidence to support Petitioner's allegation. *Id.* Moreover, Mr. Hoeferlin had no supervisory authority over Petitioner after September 2003, and no involvement with any promotion Petitioner sought in the final year of his employment or the later decision (addressed below) to place him on probation. *Id.* Mr. Hoeferlin never had a role in selecting individuals to take the MA test. *Id.* Petitioner admitted that neither Mr. Hoeferlin nor any other individual employed by Respondent ever made any age-related comments to him either before or after the alleged statement by Mr. Hoeferlin in 2001. *Id.*

During his employment with Respondent, Petitioner also was a member of the Diversity Team that was assembled to consider issues regarding workplace diversity for Respondent. *See* PA at 38. In November 2003, Respondent restructured the Diversity Team, requiring that all members

be Level II employees, obtain a recommendation for the team from their managers, and have received "meets requirements" or better on their most recent evaluation. *Id.* Respondent also reduced the number of members from thirteen to seven, replacing all members, including Petitioner, except for the manager of the team and one other employee. *Id.* Petitioner has admitted that his removal from the team had nothing to do with his race. *Id.*

In March 2004, after several recent complaints about Petitioner's performance and having been issued various disciplinary memoranda, Petitioner was ultimately told he was being placed on probation. *See* PA at 39. Petitioner was alternatively offered a severance agreement with five weeks' pay if he wanted to resign. *Id.* at 40. Petitioner opted to resign but then refused to sign the severance agreement. *Id.* Respondent still paid Petitioner the severance pay. *Id.*

SUMMARY OF THE ARGUMENT

The Court should deny Petitioner's petition for a writ of certiorari. The Eighth Circuit properly held that Petitioner's allegations failed to state a claim for discrimination as a matter of law and applied well-settled, correct standards of law in doing so.

Petitioner has failed to present any compelling reasons to justify his petition for a writ of certiorari. Despite Petitioner's misguided and unsupported assertions to the contrary, the Eighth Circuit's decision does not conflict with any precedent from this Court or any of the Courts of Appeals. Petitioner simply disagrees with the Eighth Circuit's application of well-settled law (which is in harmony with

the precedent from this Court and all other Courts of Appeals) to his particular facts. Petitioner's petition should be denied.

Upon Respondent's motion to dismiss at the outset of this litigation, the District Court correctly ruled that the majority of Petitioner's claims were untimely under the Age Discrimination in Employment Act ("ADEA"), 23 U.S.C. §621 *et seq.*, and that he failed to properly administratively exhaust other purported claims under that statute and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The District Court properly also ruled that Petitioner's claims for sex, age and national origin discrimination are not covered under §1981 as he had alleged. All that remained were age discrimination claims under the ADEA that alleged conduct occurring within 300 days of Petitioner's filing of his charge questionnaire, and Petitioner's claim for reverse race discrimination under §1981, alleging conduct occurring within four years of the filing of his complaint.[1]

Following discovery, the District Court properly granted Respondent's motion for summary judgment as to Petitioner's remaining claims of age and reverse race discrimination. As the District Court and the Eighth Circuit properly found, Petitioner failed to establish even a *prima facie* case of discrimination as to his allegations of failure to promote and other discrimination. In particular,

[1] For some reason, Petitioner suggests in his petition that the Eighth Circuit inappropriately dismissed his claims under §1981 for a failure to exhaust his administrative remedies, which would be a valid argument had that been the basis for the Eighth Circuit's or the District Court's opinions. However, it is clear that this was not a part of either court's decision in this case and supports no basis for review.

it is undisputed that Petitioner was not qualified for any promotion he sought, and it is undisputed that there is no similarly situated individual younger than Petitioner or non-white who was treated more favorably than Petitioner.

Similarly, Petitioner's claim of constructive discharge fails as a matter of law. His working conditions were not intolerable, and regardless had nothing to do with his age or race. Accordingly, Petitioner's claims fail as a matter of law.

ARGUMENT

Petitioner has not presented any compelling reasons for review. Despite his bald assertions to the contrary, the decision of the Eighth Circuit does not conflict with any precedent from this Court or any Courts of Appeals. The Eighth Circuit applied well-settled principles of law that have been endorsed by this Court and every other Court of Appeals. Petitioner simply disagrees with the application of those principles to the facts of his case despite having failed to satisfy his burdens of proof.

I. PETITIONER HAS FAILED TO IDENTIFY HOW THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH ANY RULINGS OF THIS COURT OR ANY COURTS OF APPEALS.

Petitioner has failed to identify any compelling reasons for review as required by Supreme Court Rule 10, despite his vague references to a decision from this Court in June 2006 and random excerpts from several Courts of

Appeals that he claims conflict with the underlying decision of the Eighth Circuit Court of Appeals.[2]

Under Supreme Court Rule 10, the only general bases under which Petitioner could argue for review include:

1) The Eighth Circuit's decision is in conflict with another court of appeals, a state court of last resort regarding an important federal question, or that so far departs from the usual course of judicial proceedings that warrants the exercise of the Court's supervision; or

2) The Eighth Circuit's decision involves an important federal question and conflicts with relevant decisions of this Court.

See SUP. CT. RULE 10(a)-(c).

Petitioner has failed to satisfy either of the general bases described above and has offered no other basis to warrant review by this Court.

---

[2] Several times in his petition, Petitioner refers to a June 2006 decision from this Court regarding retaliation in employment, sometimes referring to June 22, 2006, sometimes to June 23, 2006, and sometimes June 26, 2006. For the purposes of this response, Respondent assumes that Petitioner was referring to the decision in *Burlington N. and Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006), which was decided on June 22, 2006.

Interestingly, amongst the random collection of quotes from several Courts of Appeals Petitioner claims conflict with the decision of the Eighth Circuit in this case, he includes at least one case from the Eighth Circuit itself. *See* Petition for Writ of Certiorari at 2-3, hereinafter referred to as "Petition at p. __". This inconsistency illustrates the frivolous nature of Petitioner's petition.

Notwithstanding his vague references to the decision in *Burlington N. and Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006), Petitioner has failed to identify how the underlying decision of the Eighth Circuit conflicts with this recent precedent. Regardless of Petitioner's thin comparison, the ruling in *Burlington* is simply inapposite to any portion of the Eighth Circuit's underlying decision. Moreover, again, Petitioner has not articulated any conflict between these two cases.[3]

Finally, Petitioner cites to several random cases from a number of Courts of Appeals for the proposition that summary judgment should seldom be granted in an employment discrimination case that involves issues of intent, motive, etc. *See* Petition at p. 2-3. However, nothing

---

[3] Though Petitioner checked the box for retaliation in his Equal Employment Opportunity Commission ("EEOC") charge questionnaire, he never included a claim for retaliation in his complaint before the District Court and never raised any allegations or facts supporting a claim for retaliation in any of his many pleadings filed with that court. Indeed, it was not until more than **eight months *after* the District Court entered summary judgment** dismissing Petitioner's claims that he raised allegations of retaliation for the first time in this proceeding, explicitly based on this Court's decision in *Burlington*. *See* Petitioner's Amended Brief to Eighth Circuit Court of Appeals, dated June 23, 2006, in Respondent's Appendix at page 14.

In his petition, Petitioner now claims that this case is all about "**RETALIATION**", despite never having raised that argument with the District Court. *See* Petitioner's Petition for a Writ of Certiorari at page 9. As this Court is well aware, Petitioner cannot raise claims for the first time on appeal. Nevertheless, had Petitioner properly raised this argument with the lower court, the evidence clearly demonstrates that he has neither alleged, nor offered any evidence to support, any facts evidencing unlawful retaliation. Petitioner's transparent (and improper) attempt to capitalize on recent case law – inapposite to his own claims – underscores the frivolousness of his original claims, appeal and petition for a writ of certiorari.

in the Eighth Circuit's underlying decision conflicts with this precedent (some of which is quoted from the Eighth Circuit). As this Court has always held, even with the precedent cited by Petitioner, courts are free to grant summary judgment in employment discrimination cases when there is no issue of material fact and the circumstances warrant such a decision. Petitioner does not argue that the Eighth Circuit applied any standards in conflict with other Courts of Appeals or this Court. He simply disagrees that his facts warrant the grant of summary judgment. Petitioner's argument does not warrant review by this Court.

II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER'S ALLEGATIONS FAILED TO STATE A CLAIM AS A MATTER OF LAW.

A. Several of Petitioner's allegations of employment discrimination were either untimely or had not been exhausted through the administrative process and thus are prohibited as a matter of law.

1. Petitioner failed to exhaust his administrative remedies with respect to several allegations of race, sex, and national origin discrimination under Title VII.

Ruling on Respondent's Motion to Dismiss, the District Court properly held that Petitioner's claims of sex, race and national origin discrimination under Title VII were invalid because he failed to exhaust his administrative remedies as to those claims. In order to successfully maintain claims under Title VII, a plaintiff must first pursue those claims through the administrative charge

process of the EEOC within 300 days of the alleged discriminatory conduct. 42 U.S.C. §2000e-5(e)(1); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110-12 (1988); *Shannon v. Ford Motor Co.*, 72 F.3d 678, 684 (8th Cir. 1996). If a plaintiff were allowed to bring a claim outside the scope of the EEOC charge, it would "circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. . . ." *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 223 (8th Cir. 1994). Petitioner did not assert claims of sex, race or national origin discrimination in his charge questionnaire. Therefore, Petitioner cannot pursue such claims here. *Shannon*, 72 F.3d at 684-86.

Courts recognize claims as exhausted when they have been actually filed before the EEOC or when they are "like or reasonably related to the allegations of the [administrative] charge." *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986). This Court has held that claims are deemed to be like or reasonably related when they "could reasonably be expected to grow out of the charge of discrimination." *Cobb v. Stringer*, 850 F.2d 356, 359 (8th Cir. 1988) (quoting *Griffith v. Carlin*, 755 F.2d 1516, 1522 (11th Cir. 1985)). In response, Petitioner argues that these claims are reasonably related because the EEOC issued a right to sue letter on his ADEA claims. It is unclear why Petitioner believes the issuance of a right to sue letter on ADEA claims has any bearing on the relationship of those claims to claims brought under Title VII. At a minimum, Petitioner has done nothing to explain that relationship or how the District Court's dismissal was improper because of the right to sue letter.

In its order dismissing Petitioner's claims, the District Court held that it was clear from Petitioner's charge

questionnaire that he did not present any claims of race, sex, or national origin discrimination to the EEOC. *See* Respondent's Appendix at page 6, hereinafter referred to as "RA at p. __". It further held that Petitioner's claims of race, sex, and national origin discrimination under Title VII were not like or reasonably related to the allegations in the administrative charge questionnaire. *Id.* Failure to pursue the administrative remedies to the extent required by the statute operates as a bar to judicial relief. *Miller v. Runyon*, 32 F.3d 386 (8th Cir. 1994); *see Briley v. Carlin*, 172 F.3d 567, 572-73 (8th Cir. 1999) (affirming grant of summary judgment based on failure to exhaust administrative remedies, as failure to promote claim was not related to plaintiff's EEOC complaint concerning reduced duties). Accordingly, the District Court's dismissal (and the Eighth Circuit's corresponding affirmance) of Petitioner's Title VII claims not raised before the EEOC cannot provide the basis for review by this Court.

2. Petitioner also failed to exhaust his administrative remedies with respect to several allegations of age discrimination under the ADEA that occurred more than 300 days prior to the date of his charge questionnaire.

Similar to its ruling on the Title VII claims discussed above, the District Court and the Eighth Circuit properly held that in order to bring a claim of age discrimination under the ADEA, a plaintiff must file a charge of discrimination regarding the alleged unlawful conduct within 300 days of it. *See* RA at p. 7; *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 835 (8th Cir. 2002). All discrete acts of

discrimination occurring prior to 300 days before the filing of a charge are deemed untimely and invalid. *Id.*

The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADEA, but rather is treated like a statute of limitations and is subject to waiver, estoppel and equitable tolling. *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file a timely charge, his action is barred unless he can demonstrate that the limitations period is subject to equitable modification. *Id.*

Following this Court's precedent, the District Court properly found that denial of a promotion is a discrete event and not a continuing violation. *See* RA at pp. 7-8. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Although Petitioner alleged that Respondent discriminated against him for four years, he could only file a charge to cover discrete acts that occurred within the timely filing period. *Id.*

The District Court noted that Petitioner's charge states that he applied for nine different positions, but does not provide the dates when he was denied each promotion. *See* RA at p. 8. Petitioner's complaint states that during the period from June 1, 1999 through March 1, 2004, he was denied approximately eight promotion opportunities. Petitioner has not exhausted his administrative remedies with respect to any failure to promote claims for any

denials of promotions that occurred more than 300 days prior to the filing of his EEOC charge questionnaire, and the District Court's dismissal (and the Eighth Circuit's affirmance) of those allegations is proper and does not provide a basis for review by this Court.

3. The District Court and the Eighth Circuit further properly held that Section 1981 does not encompass Petitioner's claims for alleged sex, age and national origin discrimination.

The District Court's Memorandum and Order dismissing Petitioner's improper §1981 claims correctly applied the law to the facts of this case. Section 1981 covers purely private acts of discrimination in the making and enforcement of contracts. 42 U.S.C. §1981(a); *Griffin v. Pinkerton's, Inc.*, 173 F.3d 661, 664 (8th Cir. 1999). "Since the enactment of the 1991 Civil Rights Act, this provision has provided a basis for suits against employers for racial harassment on the job." *Id.* Although the typical §1981 case involves discrimination against a minority race, the statute also protects white citizens from racial discrimination. *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273, 286-87 (1976).

The District Court and the Eighth Circuit properly found that Petitioner cannot recover for sex, age or national origin discrimination under §1981. *See* RA at p. 10. Section 1981 does not apply to discrimination based on sex. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976). Also, a plaintiff cannot recover under §1981 for discrimination based solely on the place or nation of his origin. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987). There is also no history of the statute being applied to age

discrimination claims. The District Court's and Eighth Circuit's dismissal of Petitioner's §1981 claims cannot provide a basis for review.

B. Petitioner's remaining, timely allegations of age discrimination fail. Petitioner admitted that he failed to meet necessary qualifications for advancement, and he admitted that his age was not a factor in his resignation.

The grant of summary judgment dismissing Petitioner's remaining timely claims of age discrimination was proper. Petitioner claims that within the 300 days prior to the filing of his charge questionnaire, he experienced the following unlawful acts due to his age: (1) he was denied one rental division manager promotion that he sought; (2) he was denied a request to take the MA test; (3) he was denied study materials for the MA test; and (4) he was forced to resign. The District Court properly found that Petitioner cannot establish a viable claim of age discrimination as to any of these incidents.

Petitioner lacks any direct evidence of age discrimination and had to pursue his claim of age discrimination under the indirect, burden-shifting method. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). Under the indirect, burden-shifting method of proof, Petitioner must first establish a *prima facie* case of age discrimination. *Id.* If he can, the burden switches to Respondent to put forth a legitimate, non-discriminatory explanation for the alleged discriminatory conduct. *Id.* Then Petitioner must meet his ultimate burden and demonstrate that Respondent's explanation is untrue, and the real reason is intentional age discrimination. *Id.* The District Court and the Eighth Circuit correctly found that

Petitioner lacks any evidence to meet either of his burdens of proof.

To establish a *prima facie* case of age discrimination under the ADEA, a plaintiff must demonstrate that (1) he is within the protected class; (2) he was qualified to perform the job; (3) he suffered an adverse employment action; and (4) nonmembers of his class were not treated the same. *See Breeding*, 164 F.3d at 1156. Petitioner cannot meet this burden as to any alleged discriminatory acts.

1. ***An alleged ageist statement from Petitioner's former supervisor cannot stand as direct evidence of age discrimination because it was a stray remark and allegedly occurred three years before the conduct at issue.***

As evidence of age discrimination, Petitioner contends that in March 2001 his former supervisor, Keith Hoeferlin, told him that he was "too old and too slow and Matt [a younger colleague of Petitioner] is younger and faster and can whip through call backs faster." *See* Petition at p. 4. Even if this statement was actually made, it does not constitute evidence of age discrimination, much less direct evidence, which could support Petitioner's claims.

The District Court properly articulated two bases for its rejection of Petitioner's position that this statement is direct evidence of discrimination. *See* PA at p. 42. First, Mr. Hoeferlin was not a decisionmaker with respect to the decisionmaking process at issue in this case. *Id.*; *Breeding*, 164 F.3d at 1157 (holding that statements and actions by nondecisionmakers are insufficient as a matter of law to

support a claim of age discrimination). Mr. Hoeferlin was not Petitioner's supervisor when the alleged discriminatory conduct occurred, and he had no role in any of the complained of situations. *See* PA at p. 42; *Yates v. McDonnell Douglas*, 255 F.3d 546, 549 (8th Cir. 2001) (conduct of individuals not involved in employment decisions is insufficient to support a claim of age discrimination).

To constitute direct evidence of discrimination, there must be a *causal link* between the statement and the allegedly discriminatory conduct. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995). Statements made by nondecisionmakers, and statements made by decisionmakers that are unrelated to the allegedly discriminatory decision, are merely stray remarks, which cannot support a claim of discrimination, even circumstantially. *See Gartman v. Gencorp, Inc.*, 120 F.3d 127, 131 (8th Cir. 1997). Despite his unsupported assertions that Mr. Hoeferlin was his supervisor, Petitioner fails to support any claim that Mr. Hoeferlin was his supervisor *with respect to the decisionmaking process at issue in this case.* Because he was a nondecisionmaker, Mr. Hoeferlin's alleged comment is nothing more than a stray remark, as the District Court and the Eighth Circuit correctly held.

Second, the District Court and the Eighth Circuit properly found that the three-year span of time between the alleged statement and the employment actions at issue also shows there is not a connection between the two. *See* PA at p. 42-43. The comment is a stray remark and falls short of the standard required for circumstantial or direct evidence, even if Mr. Hoeferlin was a decisionmaker, which he was not. *See Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427 (8th Cir. 1999) (statement by supervisor two years before he was involved in the employment decision

was too remote in time to support claim of discrimination); *Simmons v. OCé-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999) (holding similarly); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1316 (8th Cir. 1996) (holding similarly regarding comment made fourteen months prior to adverse action at issue).

The isolated nature of the alleged comment of Mr. Hoeferlin further diminishes any evidential value. "Not every prejudiced remark made at work supports an inference of illegal employment discrimination." *See Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir. 1998); *see also Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113 (8th Cir. 2001) (in the age discrimination context, "as in all areas of discrimination law, we hesitate to rely on isolated comments as proof of bias, lest the law become a 'general civility code'"). Petitioner has admitted that neither Mr. Hoeferlin nor anyone else at Respondent ever made any age-related comments to him either before or after the alleged statement by Mr. Hoeferlin in March of 2001. Therefore, Mr. Hoeferlin's remote comment cannot constitute evidence of age discrimination.[4]

In his Petition to this Court, Petitioner incorrectly asserts that Mr. Hoeferlin's alleged statement is direct

[4] Any alleged causal link between the employment decisions Plaintiff complains about and the statement allegedly made by Mr. Hoeferlin is also undercut by Respondent's hiring of Plaintiff when he was fifty-six years old. *See Sprenger*, 253 F.3d at 1113 (holding that a comment about "teaching old dogs new tricks" is less probative of discrimination when weighed against the plaintiff's hiring at fifty-two and then allegedly suffered discrimination for being too old just four years later).

evidence of age discrimination because it and the decisionmaking process at issue in this case established a continuing violation. *See* Petition at p. 11. The District Court found that Petitioner had only alleged discrete acts of discrimination. *See* PA at p. 43. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R.*, 536 U.S. at 114.

As stated by the District Court, Petitioner's actionable allegations described separate discrete acts. *See* PA at p. 43. Only the acts occurring within the 300 days prior to Petitioner's charge questionnaire are actionable, so Mr. Hoeferlin's alleged comment is a stray remark and not relevant to Petitioner's actionable claims. Fatally absent from Petitioner's ramblings to this Court about continuing violations and career contamination is any attempt to rebut the reasons given by Respondent and endorsed by the District Court. Accordingly, this cannot provide the basis for review.

2. ***Petitioner cannot establish a prima facie case of age discrimination for failure to promote because he admitted he was not qualified for the position, no similarly situated employee outside of his protected group was given the position, and he cannot refute Respondent's legitimate, non-discriminatory reasons for its actions.***

The District Court and the Eighth Circuit correctly found that Petitioner cannot meet the second or fourth *prima facie* elements regarding the one promotion at issue

in this case. *See* PA at p. 45. Petitioner was not qualified for that position, the second *prima facie* element, in that he had not taken and passed the MA test. As stated by the District Court, Petitioner has explicitly admitted that he needed to have successfully completed the MA test to be eligible for that or any rental manager promotion. *See* PA at p. 44-45. Thus, Petitioner's claim necessarily fails. *See Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046-47 (8th Cir. 2005) (affirming summary judgment against employee who could not "show that her qualifications are equivalent to the minimum objective criteria" because she had not passed and was not qualified to take a necessary test for promotion); *Breeding*, 164 F.3d at 1158.

In his petition to this Court, Petitioner blames Respondent's counsel's "gamesmanship" for manufacturing an admission that he was not qualified for the promotion he sought. *See* Petition at p. 16. Of course, Petitioner later admits – again – that he needed to have passed the MA test to be qualified for the promotion he sought. *See* Petition at 18. Without this essential element that Petitioner admits he did not have, the District Court and the Eighth Circuit were correct in holding that Petitioner's own belief that he was independently qualified for the position was immaterial. *See* PA at p. 45.

As an additional basis for finding Petitioner did not satisfy his *prima facie* burden, the District Court and the Eighth Circuit found that Petitioner could not demonstrate that similarly situated individuals outside the protected class were treated more favorably than he, the fourth *prima facie* requirement. *See* PA at p. 45. Petitioner admitted that every individual he contends was promoted to a rental division manager position instead of him had taken the MA test and was at the time working in the

rental division. *See* PA at p. 45. Also, no other employee in an entry level callback division position, Petitioner's position, was promoted directly to a rental division manager position. *Id.* The individual promoted to the rental division manager position at issue had taken and passed the MA test and worked in the rental division. *Id.* Petitioner does not even contest this point.

In fact, Petitioner does not even allege that any specific younger employees in the callback division were treated more favorably than he was. *See* PA at p. 45. As a result, the District Court and the Eighth Circuit correctly held that Petitioner failed to meet his burden of proof as to his promotion claim. *See* PA at p. 45; *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 383 (8th Cir. 1994) (granting summary judgment to employer where plaintiff admitted she could not identify any similarly situated individuals who received better treatment).

Even if Petitioner could establish a *prima facie* case, Respondent has articulated a legitimate, nondiscriminatory reason for its actions, which Petitioner has failed to show is a pretext for discrimination. As discussed earlier, Petitioner was not qualified for the position at issue. Failure to meet minimum requirements for a position is a legitimate, nondiscriminatory reason for denial of a promotion. Petitioner presented no evidence that age discrimination actually motivated Respondent in its decision not to promote him. Moreover, at no point has Petitioner shown that an employee was promoted without having passed the MA test and been working in the rental division. Therefore, the District Court's grant of summary judgment (and the Eighth Circuit's affirmance) on this point does not warrant review by this Court.

3. *Petitioner cannot establish a prima facie case of age discrimination against Respondent for not allowing him to take the MA test or providing him study materials because Petitioner was not qualified to take the test or receive the study materials.*

For the same reasons that applied to Petitioner's failure to promote claim, the District Court correctly found that Petitioner also failed to establish a *prima facie* case regarding his claim of not being selected to take the MA test. *See* PA at p. 46-47. Petitioner was not qualified to take the MA test because he refused to work in the rental division, a fact that he has admitted was a requirement to be selected to take the MA test. *Id.*

Petitioner was offered several chances to work in the rental division because it was a requirement to take the MA test. *See* PA at 35, 36. Petitioner, aware of this fact, refused every invitation and does not contest this point. *Id.* The District Court and the Eighth Circuit recognized and agreed that this unwillingness to work in the rental division was the real reason Petitioner was not allowed to take the MA test. *See* PA at p. 46. Being unqualified to take the MA test, Petitioner could not establish his *prima facie* case. *Calder v. TCI Cablevision of Mo.*, 298 F.3d 723, 730 (8th Cir. 2002).

Likewise, the District Court and the Eighth Circuit also found that Petitioner had not shown that similarly situated individuals outside the protected class were allowed to take the MA test. *See* PA at p. 46. Petitioner does not dispute that no one in his position was allowed to take the MA test. *See* PA at 46-47. Petitioner was treated identically to his younger, similarly situated colleagues.

The District Court was correct in holding that Petitioner's claim thus must fail as a matter of law. *See Harlston*, 37 F.3d at 383.

Petitioner's bootstrap claim that he was denied study materials related to the MA test is also without merit. As stated by the District Court, "[t]he MA study materials were only given to [Respondent's] employees selected to take the MA test, and the MA test was only given to employees in the rental division." *See* PA at p. 46.

Regardless, denial of the study materials is not an adverse action, the third *prima facie* element of a claim for employment discrimination. *See Breeding*, 164 F.3d at 1156. *See also Higgins v. Gonzales*, Case No. 06-2556, 2007 WL 817505, *4-7 (8th Cir., Mar. 20, 2007) (any of a variety of adverse actions alleged by the plaintiff, either by themselves or in the aggregate, are insufficient to support a claim for employment discrimination because they did not represent a material employment disadvantage); *Spears v. Mo. Dep't of Corr. and Human Res.*, 210 F.3d 850, 853 (8th Cir. 2000) (stating that an adverse employment action is a "tangible change in working conditions that produces a material employment disadvantage" such as "[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects"); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (court held that actions that have only a tangential effect on plaintiff's employment do not rise to the level of an ultimate employment decision).

This claim further fails because as of the fall of 2003, Respondent stopped generating and supplying study materials for the MA test. *See* PA at 35-36. Thus, the study materials were not even disseminated during a large part

of the relevant time period at issue. There is no credible evidence that after the fall of 2003, Respondent supplied study materials to any employee, much less a similarly situated employee. For all of these reasons, the District Court's grant of summary judgment on Petitioner's allegations regarding the MA test and study materials (and the Eighth Circuit's affirmance) cannot provide the basis for review by this Court.

4. Petitioner's removal from the diversity team was not an act of unlawful discrimination because it was not an adverse employment action that presented any tangible change in working conditions or produced any material employment disadvantage.

Again, the District Court properly found that Petitioner failed to make a *prima facie* case, this time regarding his removal from the Diversity Team. *See* PA at p. 47-48. Removal from the Diversity Team is not an adverse employment action. *Id.* An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage. *Id.*; *see Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000) (ADEA case); *Higgins*, 2007 WL 817505 at *4-7 (Title VII case). "Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard. . . . Minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage" are not adverse employment actions. *Id.* at *4 (internal citations omitted).

The District Court and the Eighth Circuit agreed that Petitioner produced no evidence that removal from the Diversity Team changed any of his work conditions. *See* PA at p. 47-48. Membership on the Diversity Team was not a required work activity. *Id.* Further, the number of Diversity Team members was reduced from thirteen to seven, and only two members remained after the restructuring. *Id.* Petitioner was one of eleven people removed from the Team, and he offered no evidence that the two remaining members were similarly situated employees treated more favorably than he was or that there was age discrimination. *Id.*

Also, additional requirements for team membership were adopted after the restructuring, and Petitioner did not meet those requirements – a point which Petitioner does not contest. *Id.* Petitioner's removal from the Diversity Team does not warrant review.

5. Petitioner's claim for constructive discharge also must fail because he failed to show either that his working conditions were intolerable or that he took any steps to make those conditions more tolerable.

Petitioner's claim of forced resignation also fails. Notably, Petitioner offers no arguments in his petition that would refute the District Court's offered rationale for this finding. For Petitioner to succeed on this claim he must demonstrate that he was constructively discharged. This is a high burden of proof and one that Petitioner cannot meet.

To demonstrate constructive discharge, a plaintiff must show the employer "deliberately made or allowed

[his] working conditions to become so intolerable that the employee had *no other choice* but to quit." *Jones v. Fitzgerald*, 285 F.3d 705, 715-16 (8th Cir. 2002) (emphasis in original); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). Petitioner must show that his employer intentionally forced him to quit his job – and did so because of his age – by creating intolerable working conditions. *Phillips*, 156 F.3d at 890. Petitioner must demonstrate that a reasonable person would feel compelled to resign under his alleged working conditions. *See Spears,* 210 F.3d at 854-55. The circumstances here do not support such a claim, and Petitioner has never offered any evidence that could meet such a high burden.

The District Court found that on March 2, 2004, Petitioner received a performance memorandum stating that he was being placed on probation for ninety days. *See* PA at p. 49. The memorandum cautioned that if Petitioner failed to meet or surpass the group's fiscal year average or caused any additional complaints from customers or colleagues, disciplinary action would be taken up to and including termination of employment. *Id.* Petitioner was verbally given the option to resign with five weeks severance pay. *Id.* at 49-50. Petitioner chose to resign, but did not sign the severance agreement. *Id.* Respondent still paid Petitioner the severance pay. *Id.*

Against this backdrop, the District Court and the Eighth Circuit properly held that Petitioner cannot demonstrate that his working conditions were intolerable. Essentially, Petitioner contended that he felt he would not be able to complete the probationary period without incurring further complaints about his performance. Petitioner is not entitled to speculate that the worst outcome would have resulted. *Phillips,* 156 F.3d at 890

("an employee has an obligation not to assume the worst and jump to conclusions too quickly. An employee who quits without giving [his] employer a reasonable chance to work out a problem has not been constructively discharged") (internal citations omitted). Put another way, friction between Petitioner and his superiors over his job performance is insufficient to support a constructive discharge claim. *See, e.g., Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000) (holding problems resulting from inter-office politics and personality conflicts insufficient to support Title VII claim).

Additionally, that Petitioner was denied promotions during his employment at Respondent also cannot sustain his claim. Not being promoted does not make one's working conditions intolerable. *See, e.g., Breeding,* 164 F.3d at 1159 (denial of promotion was insufficient to support constructive discharge claim). Petitioner simply lacks any credible evidence whatsoever suggesting that his working conditions were intolerable and that he was forced to resign. *See, e.g., Howard v. Burns Bros., Inc.*, 149 F.3d 835, 841-42 (8th Cir. 1998) (to prove constructive discharge the workplace must be severely contaminated with discriminatory acts and there must be a lack of recourse for the employee).

Even if Petitioner could show that he was forced to resign his position, he lacks any evidence that Respondent forced him to resign *because of his age*. According to Petitioner, he resigned because he felt the complaints about him (that led to his probation) would continue and lead to his discharge, and that the complaints were due strictly to his position and a co-worker who was out to get him because of the position he held. *See* PA at p. 38-39. According to Petitioner, this employee wanted Petitioner's

call-center to fail, and he was more or less caught in the middle. *Id.* Petitioner agrees that neither his co-worker's motivation nor the position he was in were attributable to his age. *Id.* Accordingly, the District Court's grant of summary judgment on this point (and the Eighth Circuit's affirmance) does not warrant review.

C. Finally, Petitioner's claim of reverse race discrimination also fails as a matter of law. Petitioner lacks any evidence that Respondent discriminated against him because he is Caucasian.

Lastly, Petitioner contends that he was discriminated against by Respondent because he is Caucasian. Because §1981 does not have a charge-filing requirement, Petitioner could pursue such a claim, despite that he never claimed such discrimination in his charge questionnaire. However, there is a four-year statute of limitations, so Petitioner can only pursue instances of alleged discrimination occurring within four years of the filing of his lawsuit. *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 382 (2004). Petitioner's minimal allegations in this regard, like his allegations of age discrimination, are entirely without merit.

Petitioner claims that within the four years prior to the filing of his complaint, he experienced the following unlawful acts due to his race: (1) other non-Caucasians were promoted before him; (2) he was denied study materials for the MA test because of his race; and (3) he was pulled off of the Diversity Team at Respondent because of

his race. Petitioner cannot establish a viable claim of reverse race discrimination as to any of these incidents.[5]

As with his claim of age discrimination, the District Court properly determined that Petitioner must pursue his claim of race discrimination under the indirect, burden-shifting method. *See* PA at p. 51; *see Saulsberry v. St. Mary's Univ. of Minn.*, 318 F.3d 862, 866 (8th Cir. 2003) (holding that the elements of a §1981 claim are the same as that under discrimination statutes like the ADEA). But because Petitioner is claiming *reverse* race discrimination, he must also prove (in addition to the four *prima facie* elements discussed earlier) a fifth element. Petitioner must present additional evidence of reverse race discrimination at Respondent – i.e., "background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *See Duffy v. Wolfe*, 123 F.3d 1026, 1036 (8th Cir. 1997).

Demonstration of these "background circumstances" is a high burden. *See Hammer v. Ashcroft*, 383 F.3d 722, 725 (8th Cir. 2004) (employer's affirmative efforts to recruit minority and female applicants, through a written memorandum stating that "it might be advisable to consider a minority," is not sufficient evidence of background circumstances for a discrimination plaintiff to satisfy her *prima facie* burden). Petitioner lacks any such evidence to satisfy this burden.

---

[5] It is unclear whether Petitioner contends that his removal from the Diversity Team is an act of race discrimination. In his deposition, he stated that he was removed, "[b]e it black, white, red, green or purple, that was how I took it at that time." PA at 53. Respondent and the Courts nevertheless addressed it.

At best Petitioner contends that Mr. Hoeferlin once expressed concern to Petitioner that an African-American female employee should be promoted for fear of a discrimination complaint from her. *See* Petition at p. 20. That allegation is pure hearsay. In addition, Petitioner's reckless implication that the employee somehow was not qualified for promotion is wholly insufficient to meet his burden of proof. *Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037, 1038 (8th Cir. 2004). Not surprisingly, Petitioner also lacks any credible evidence to support his seemingly racist and sexist speculation. It is not evidence of reverse discrimination, let alone discrimination toward Petitioner, that Respondent promoted an African-American female. Perhaps to Petitioner's satisfaction, and no doubt unremarkable to this Court, Respondent has promoted many Caucasian employees. Accordingly, Petitioner cannot meet his burden of proof.

Assuming Petitioner could establish such background circumstances of reverse discrimination, the District Court and the Eighth Circuit found that his race discrimination allegations still fail for several reasons. *See* PA at p. 52. Specifically, the District Court found that Petitioner failed to articulate a *prima facie* case regarding failure to promote and to provide study materials for the same reasons as with Petitioner's claim of age discrimination. *Id.*

As for being removed from the Diversity Team, the District Court and the Eighth Circuit properly found that Petitioner's claim fails at the *prima facie* stage. *See* PA at p. 53-54. First, as discussed before, removal from the Diversity Team is not an adverse employment action. *See Higgins*, 2007 WL 817505 at *4-7. Second, Petitioner lacks any evidence that similarly situated individuals outside the protected class were treated better than he was.

Nearly the entire roster of the Diversity Team was changed. A restructuring of that team (reducing the number of members from thirteen to seven) and new requirements to be on the team, resulted in a removal of eleven out of thirteen team members. Thus, Petitioner was treated the same as any other member. Petitioner has failed to offer any evidence to the contrary, either before the District Court or on appeal.

Petitioner also lacks any evidence to meet his ultimate burden of proof as to his removal from the Diversity Team. Respondent instituted new requirements that were legitimate and served to improve the quality of that team. *See Cooney v. Union Pac. R.R. Co.*, 258 F.3d 731, 736 (8th Cir. 2001) ("A company's exercise of its business judgment is not a proper subject for judicial oversight") (internal citations omitted). Petitioner lacks any evidence suggesting that Respondent's reasoning is untruthful or that Petitioner was removed because he is Caucasian. Therefore, Petitioner's claims of reverse race discrimination do not warrant review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RANDALL S. THOMPSON
Counsel of Record

JOSEF S. GLYNIAS
BLACKWELL SANDERS PEPER MARTIN, LLP
720 Olive Street, Ste. 2400
St. Louis, Missouri 63101
Telephone: (314) 345-6000
Facsimile: (314) 345-6060

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
MISSOURI EASTERN DIVISION

RAD W. HAMILTON,	)	
Plaintiff,	)	
v.	)	No. 4:04-CV-802 CAS
ENTERPRISE RENT-A-CAR,	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed Jan. 12, 2005)

This matter is before the Court on defendant Enterprise Leasing Company of St. Louis's ("Enterprise") motion to dismiss and/or strike plaintiff's complaint and motion to substitute proper party defendant and/or dismiss plaintiff's complaint. Plaintiff Rad Hamilton filed responses to these motions. For the following reasons, the Court will grant in part and deny in part defendant's motion to dismiss and grant defendant's motion to substitute proper party defendant.

I. Background

Plaintiff's pro se complaint states that it is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. Plaintiff names Enterprise Rent-A-Car as the defendant. Plaintiff alleges his former employer Enterprise discriminated against him based on age, sex, race, and national origin. Plaintiff's allegations assert that Enterprise discriminated against him by forced termination from employment, failure to promote, failure

to provide study materials and review, hostile work environment, and promotion of younger workers. Plaintiff asserts that defendant's actions were a continuing violation.

Enterprise filed a motion to dismiss portions of plaintiff's complaint for failure to exhaust administrative remedies and failure to state a claim upon which relief can be granted on plaintiff's claims of race, sex, and national origin discrimination and plaintiff's claims of age discrimination occurring more than 300 days prior to the date plaintiff's charge questionnaire was filed. Plaintiff responds that he exhausted his administrative remedies regarding Title VII and that § 1981 does not require exhaustion of administrative remedies. Plaintiff also "reaffirms" his original pleading and requests that his response to the motion to dismiss be considered an amended pleading.

Enterprise also asks the Court to substitute it as the proper party defendant because plaintiff has named the wrong party. The caption states that the defendant's name is Enterprise Rent-A-Car. Enterprise states that its corporate name is Enterprise Leasing Company of St. Louis. Plaintiff asserts that he has not named the wrong party and opposes the motion.

II. Legal Standard

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. A complaint shall not be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v.*

Gibson, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id.*; *see also Neitzke v. Williams,* 490 U.S. 319, 327 (1989). When ruling on a motion to dismiss, this Court must take the allegations of the complaint as true and liberally construe the complaint in a light most favorable to the plaintiff. *Kottschade v. City of Rochester,* 319 F.3d 1038, 1040 (8th Cir.), *cert. denied,* 124 S. Ct. 178 (2003).

Pro se pleadings are to be liberally construed and are held to less stringent standards than those drafted by an attorney. *Smith v. St. Bernards Reg'l Med. Ctr.,* 19 F.3d 1254, 1255 (8th Cir. 1994). Nevertheless, they must not be conclusory and must state specific facts which, when taken as true, state a claim as a matter of law. *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985); *Johnson v. Stark,* 717 F.2d 1550, 1552 (8th Cir. 1983) (citations omitted).

III. Motion to Dismiss for Failure to Exhaust Administrative Remedies under Title VII and ADEA

Under Title VII, plaintiffs must follow administrative procedures and exhaust administrative remedies by timely filing a charge of discrimination with the EEOC before filing suit in federal court. 42 U.S.C. § 2000e-5(e)(1); *see E.E.O.C. v. Commercial Office Prods. Co.,* 486 U.S. 107, 110-12 (1988); *Shannon v. Ford Motor Co.,* 72 F.3d 678, 684 (8th Cir. 1996). The ADEA also requires exhaustion of administrative remedies by filing a charge of discrimination with the EEOC or Missouri Commission on Human Rights. *See* 29 U.S.C. § 626(d); Mo. Rev. Stat. § 213.075.1 (1994); *see Dring v. McDonnell Douglas Corp.,* 58 F.3d

1323, 1327 (8th Cir. 1995) (ADEA). "Exhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts." *Shannon,* 72 F.3d at 684 (quoting *Williams v. Little Rock Mun. Water Works,* 21 F.3d 218, 222 (8th Cir. 1994)). If a plaintiff were allowed to bring a claim outside the scope of the EEOC charge, it would "circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. . . ." *Williams,* 21 F.3d at 223 (quoting *Babrocky v. Jewel Food Co.,* 773 F.2d 857, 863 (7th Cir. 1985)). Courts recognize claims as exhausted when they have been actually filed before the EEOC or when they are "like or reasonably related to the allegations of the [administrative] charge." *Anderson v. Block,* 807 F.2d 145, 148 (8th Cir. 1986). The Eighth Circuit has held that claims are deemed to be like or reasonably related when they "could reasonably be expected to grow out of the charge of discrimination." *Cobb v. Stringer,* 850 F.2d 356, 359 (8th Cir. 1988) (quoting *Griffin v. Carlin,* 755 F.2d 1516, 1522 (11th Cir. 1985)).

A. Title VII

Plaintiff's charge questionnaire filed with the EEOC asserts discrimination based on age and retaliation. Plaintiff's charge questionnaire[1] states:

---

[1] Plaintiff did not file a charge of discrimination, but his charge questionnaire was filed under penalty of perjury. Defendant does not

(Continued on following page)

> Keith Hoeferlin stated "your [sic] to [sic] old and too slow" Matt is young and I've seen him whip through the extensions and claims so fast. My "MA" test was cancelled 5 times to prevent me from getting promoted. All 9 positions I applied for I'm told I don't qualify for anything.
>
> . . . .
>
> Continued issues of not qualified for any position without passing "MA" test cancelled 5 times.

Ex. A, pp. 2, 3.

The charge questionnaire also states that plaintiff believes he was discriminated against because he was the only 61 year old level 1 employee at Enterprise. (Ex. A, p. 4.) The charge questionnaire states that plaintiff was retaliated against because he was told that he was a "disgruntled employee" and "asked to leave Enterprise March 1, 2004." Plaintiff completed the questionnaire's sections on hiring and promotion and retaliation. Plaintiff also checked the boxes labeled "age" and "retaliation" in the appropriate sections of the questionnaire. Plaintiff did not check the boxes labeled race, sex, or national origin. Plaintiff did not fill out the section labeled harassment.

Plaintiff's complaint states that defendant discriminated against him on or about June 1, 1999 continuing through March 1, 2004, creating a hostile work environment and a continuing violation. (Comp. ¶ 5.) Plaintiff's complaint asserts that plaintiff was discriminated against

---

assert that the charge intake questionnaire fails to satisfy Title VII's statutory regulation for an administrative charge of discrimination.

based on his age, sex, race, and national origin. (Compl. ¶ 10).

It is clear from plaintiff's charge questionnaire that he did not present any claims of race, sex, or national origin discrimination to the EEOC. Plaintiff's claims of race, sex, and national origin discrimination under Title VII are not like or reasonably related to the allegations in the administrative charge questionnaire. The scope of any subsequent federal court action is defined by claims encompassed within the prior EEO claim, and like or related matters that might be reasonably expected to be subject to the ensuing EEOC investigation growing out of the claims. *See Williams,* 21 F.3d at 222-23. Failure to pursue the administrative remedies to the extent required by the statute operates as a bar to judicial relief. *Miller v. Runyon,* 32 F.3d 386 (8th Cir. 1994); *see Briley v. Carlin,* 172 F.3d 567, 572-73 (8th Cir. 1999) (affirming grant of summary judgment based on failure to exhaust administrative remedies, as failure to promote claim was not related to plaintiff's EEO complaint concerning reduced duties). Therefore, the Court will grant defendant's motion to dismiss plaintiff's claims of discrimination based on race, sex, age, and national origin under Title VII.

B. Age Discrimination Claims

Next, defendant asserts that plaintiff's claims of age discrimination occurring more than 300 days prior to the date of plaintiff's charge questionnaire should be dismissed as untimely because plaintiff has failed to exhaust his administrative remedies. Plaintiff does not assert that he is suing under the ADEA, however, giving his complaint the liberal construction due to pro se filings, the Court will

assume plaintiff is bringing his age discrimination claims under the ADEA instead of Title VII, as Title VII does not forbid employment discrimination based on age. 42 U.S.C. § 2000e-2(a). Plaintiff's charge questionnaire was filed March 9, 2004. In the charge he states several times that he was discriminated and retaliated against during the past four years. (Ex. A, pp. 3, 4, and 7). Plaintiff also asserts in his charge and complaint that defendant's actions were a continuing violation. (Compl. ¶ 12), (Ex. A, p. 3).

Under the ADEA, a plaintiff has 180 days to file a charge of discrimination with the EEOC after the date of the "alleged unlawful practice". 29 U.S.C. § 626(d)(2). Because Missouri also has a law prohibiting age-based discrimination, a plaintiff has 300 days from the date of the allegedly discriminatory action to file an EEOC charge. *Id.* The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADEA, but rather is treated like a statute of limitations and is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982); *Dring v. McDonnell Douglas Corp.,* 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file a timely charge, his action is barred unless he can demonstrate that the limitations period is subject to equitable modification. *Dring,* 58 F.3d at 1327. Defendant asserts that denial of a promotion is a discrete event and not a continuing violation. The Court agrees. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *National Railroad Passenger Corp.*

v. Morgan, 536 U.S. 101, 114 (2002). Although plaintiff alleges that Enterprise discriminated against him for four years, he can only file a charge to cover discrete acts that occurred within the timely filing period. *Id.* Plaintiff's charge states that he applied for nine different positions, but does not provide the dates when he was denied each promotion. (Ex. A, p. 4). Plaintiff's complaint states that during the period from June 1, 1999 through March 1, 2004, he was denied approximately eight promotion opportunities. (Compl. ¶ 11). The Court finds that plaintiff has not exhausted his administrative remedies with respect to any failure to promote claims for any denial of promotions that occurred more than 300 days prior to the filing of his EEOC charge questionnaire. Therefore, the Court will grant defendant's motion to dismiss any ADEA age discrimination claims for failure to promote that occurred more than 300 days prior to the filing of plaintiff's EEOC charge questionnaire.

Defendant also states that plaintiff's allegations of age discrimination as to unlawful demotion and hostile work environment should be dismissed for failure to exhaust administrative remedies. Plaintiff's complaint alleges that he was demoted on October 1, 2001. (Compl. ¶ 11). He also alleges that there was a hostile work environment from June 1, 1999 through March 3, 2004. (Compl. ¶ 12). The EEOC charge does not contain these allegations, see Ex. A, and they are not like or related to the allegations in the EEOC charge. Therefore, the Court will dismiss plaintiff's claims of demotion and hostile work environment for failure to exhaust administrative remedies.

IV. Section 1981

Plaintiff's complaint asserts that "this action is brought pursuant to . . . 'Section 1981' as amended. . . ." (Compl. ¶ 1). 42 U.S.C. § 1981(a) covers purely private acts of discrimination in the making and enforcement of contracts. *Griffin v. Pinkerton's, Inc.,* 173 F.3d 661, 664 (8th Cir. 1999). "Since the enactment of the 1991 Civil Rights Act, this provision has provided a basis for suits against employers for racial harassment on the job." *Id.* Although the typical § 1981 case involves discrimination against a minority race, the statute also protects white citizens from racial discrimination. *McDonald v. Santa Fe Trail Transp.,* 427 U.S. 273, 286-87 (1976).

Defendant asserts that plaintiff cannot recover for sex or national origin discrimination under § 1981 and plaintiff has not alleged any unlawful conduct based on race in the complaint. Plaintiff responds that there is a four-year statute of limitation under § 1981 and that his action under § 1981 is not restricted by a damages cap and "avoid[s] dealing with the EEOC." Defendant replies that they do not dispute plaintiff's argument, but plaintiff, who is white, has failed to allege a valid claim of race discrimination.

It is well established that § 1981 does not apply to discrimination based on sex. *Runyon v. McCrary,* 427 U.S. 160, 167 (1976). Also, a plaintiff cannot recover under § 1981 for discrimination based solely on the place or nation of his origin. *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1987). There is also no history of the statute being applied to age discrimination claims. Plaintiff's complaint mentions race once, stating he was discriminated against with respect to his race regarding the

allegations in paragraph nine of his complaint. (Compl. ¶ 10(c)). Paragraph nine states that Enterprise forced the termination of his employment, failed to promote plaintiff, failed to provide study material for promotion, failed to provide one-on-one study of review material with branch management, terminated plaintiff from Diversity Team, and admitted through its Group Rental Manager that Enterprise was out to get him terminated.[2]

Giving plaintiff's *pro se* pleadings a liberal construction, it does not appear beyond doubt that plaintiff cannot establish a prima facie case of reverse racial discrimination under § 1981. To the extent any of those claims are outside the statute of limitations under § 1981, they will be dismissed, as will plaintiff's claims of sex, age, and national origin discrimination which are not cognizable under § 1981. Otherwise, the Court will not dismiss plaintiff's § 1981 claim for reverse racial discrimination. Thus, defendant's motion to dismiss plaintiff's § 1981 claims will be granted in part and denied in part.

V. Plaintiff's Request for Leave to Amend

Plaintiff requests in his response to the motion to dismiss that the Court "re-affirm" his original complaint "to include Section 1981 of the Civil Rights Act of 1964" and grant "this Amended pleading." First, plaintiff cannot amend his complaint in this manner. The Court does not permit supplements to complaints because it would cause confusion for the Court and the parties. In addition,

---

[2] Plaintiff asserts other claims in ¶ 9, but the Court does not include them here because they specifically referenced age discrimination, which is not covered under § 1981.

plaintiff's requested amendments as contained in his opposition motion would not cure the defects of the original complaint, i.e., plaintiff's failure to exhaust administrative remedies as to his Title VII race, sex, and national origin claims; and the Court has already concluded that plaintiff has alleged a § 1981 claim. It is well-settled law that district courts have the power to deny leave to amend if the proposed changes would not remedy the deficiencies of the original complaint. *Weimer v. Amen,* 870 F.2d 1400, 1407 (8th Cir. 1989); *Norbeck v. Davenport Community School District,* 545 F.2d 63, 70 (8th Cir. 1976).

In the future, if plaintiff wishes to amend his complaint, he must file a motion for leave to amend the complaint with a copy of the proposed amended complaint attached. Plaintiff should be aware that any amended complaint would completely replace the original complaint because an amended complaint supercedes an original complaint and renders the original complaint without legal effect. *In re: Atlas Van Lines, Inc.,* 209 F.3d 1064, 1067 (8th Cir. 2000). In addition, the plaintiff may not reassert any claims in an amended complaint that this Court has dismissed.

VI. Proper Party Defendant

Enterprise requests that the Court substitute it as the proper party defendant or dismiss plaintiff's complaint for failure to sue the proper party. Defendant affirms that its legal corporate name is Enterprise Leasing Company of St. Louis. *See* Weiss Aff. Plaintiff has sued defendant as Enterprise Rent-A-Car. Plaintiff contends that defendant is doing business as Enterprise Rent-A-Car in every state

and that all of plaintiff's documentation from defendant has Enterprise Rent-A-Car on it.

A corporation has the right to be accurately named in the process and pleadings of the court. *Roberts v. Michaels,* 219 F.3d 775, 778 (8th Cir. 2000) (quoting *United States v. A.H. Fischer Lumber Co.,* 162 F.2d 872, 873-74) (4th Cir. 1947)). The Court will order the Clerk of Court to change the caption in this case to reflect defendant's proper name.

VII. Conclusion

In conclusion, defendant's motion to dismiss plaintiff's claims of age, sex, race, and national origin discrimination under Title VII will be granted. Defendant's motion to dismiss plaintiff's allegations of age discrimination under the ADEA that occurred more than 300 days prior to the filing of plaintiff's EEOC charge questionnaire is granted. Defendant's motion to dismiss plaintiff's claims of age discrimination regarding his demotion and a hostile work environment is granted for failure to exhaust administrative remedies. Defendant's motion to dismiss plaintiff's § 1981 claims that are outside the statute of limitations is granted and defendant's motion to dismiss plaintiff's remaining § 1981 claims is denied. Defendant's motion to substitute the proper party defendant will be granted. The remaining actionable claims in plaintiff's complaint are his claims of failure to promote based on age that occurred no more than 300 days prior to the date his EEOC charge was filed, plaintiff's claim of forced resignation due to age, and plaintiff's § 1981 reverse race discrimination claim that is within the statute of limitations.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss is **GRANTED in part and DENIED in part** as set forth in this memorandum and order. [Doc. 10]

IT IS FURTHER ORDERED that defendant's motion to substitute proper party defendant is **GRANTED**. [Doc. 18]

IT IS FURTHER ORDERED that the Clerk of Court is ordered to change the caption of this case to read as follows: "Rad W. Hamilton, Plaintiff, v. Enterprise Leasing Company of St. Louis, Defendant." The parties shall use this amended caption in all future filings.

An order of partial dismissal will accompany this memorandum and order.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES
DISTRICT JUDGE

Dated this 12th day of January, 2005.

In the
United States Court Appeals
For the Eighth Circuit

Case Number: 05-4098

Rad W. Hamilton

Plaintiff-Appellant

VERSES [sic]

Enterprise Leasing Company
Of St. Louis

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Missouri
Eastern Division
No.4:04-CV-802 CAS

PURSUIANT [sic] **TO THE SUPREME COURT RULING ON JUNE 22, 2006 REGARDING THE CIVIL RIGHTS ACT OF 1964 THE FOLLOWING BRIEF IS RESPECTFULLY AMENDED**

APPELLANT'S OPPOSITION TO DISTRICT COURT'S MOTION GRANTING SUMMARY JUDGMENT TO APPELLEE

COMES NOW, Appellant respectfully requesting the Eighth Circuit Court of Appeals apply the Supreme Court's ruling that strengthens civil rights on the job resulting from a 9-0 ruling upheld June 22, 2006 that bars employers from discriminating against employees who complain of discrimination that applies to claims of discrimination based on race, religion, ethnicity, age or disability. In the case now before the court Enterprise

retaliated against Appellant after complaining that Keith Hoeferlin told Appellant that, "he was to old and to slow." Appellant was subsequently denied the opportunity to take the MA Test required for promotions within the Enterprise system. During the next five years Appellant was repeatedly denied promotions and was demoted to the call center. Appellant has repeatedly brought this to the attention of the District Court in Appellants original pleadings and the motion now before the Eight Circuit Court.

In light of the Supreme Court's ruling on June 22, 2006 Appellant respectfully request the Eight Circuit Court remand this case to trial considering the age of the Appellant (60) being a 5 year level one employee who Enterprise has admitted that Appellant was not qualified for any promotions without passing the required MA test to be qualified for a promotion that was intentionally denied to the Appellant by Enterprise. This 9-0 ruling clearly rules that Enterprise discriminated against the Appellant based on age, denying him promotions and demoting the Appellant in retaliating against Appellant for filing a discrimination complaint to management. Enterprise responded by shifting him to a less appealing job without any opportunity to be promoted for over a period of five years. With the ruling for the Supreme Court on June 22, 206 [sic] the District Courts Motion of Summary Judgment for the Appellee should be overturned as the District Court erred from case law referenced in the Appellants original brief Dated December 28, 2005.

In this case the District Court has prohibited the Appellant from establishing, "by case law" the right to a trial that reveals the existence of "genuine issues as to material fact that now exists" as outlined in the New ruling from

the Supreme Court for the Appellants case now before the Eight Circuit Court.

THEREFORE, the Appellant respectfully request that the 8th Circuit Court of Appeals remand this case to trial so a jury can decide this case given the ruling from The Supreme Court on June 22, 2006. Signed this 23rd day of June 2006.

Respectfully Submitted,

/s/ Rad W. Hamilton
Rad W. Hamilton, pro se
Appellant

Certificate of Service:

I hereby certify that a copy of the foregoing was mailed first class on June 23, 2006.

Randall Thompson
Attorney at Law
720 Olive Street, Suite 2400
St. Louis, Missouri 63101

/s/ Rad W. Hamilton
Rad W. Hamilton
Appellant

Supreme Court ruling strengthens civil rights on job

By David G. Savage
LOS ANGELES TIMES

WASHINGTON • The Supreme Court strengthened the enforcement of civil rights laws in the workplace by ruling Thursday that employers may not punish workers who file discrimination complaints by shifting them to a less appealing job.

The 9-0 ruling upheld a verdict in favor of a woman who was removed from her job as a railroad forklift operator after complaining of sexual harassment. She was reassigned to more arduous work on a track-repair crew.

In the Civil Rights Act of 1964, Congress made it illegal for employers to retaliate against employees who complain of discrimination. But until Thursday, the Supreme Court had never defined what was meant by retaliation.

The justices rejected the arguments of business lawyers who argued that "minor changes in work assignments" should not be deemed illegal simply because an employee complains of discrimination. Instead, they set a rule that bars all but trivial actions against a complaining employee.

In general, employers want to stop such complaints before they reach a jury, because the cases then can result in large damage awards.

Thursday's decision arose from a case of sex discrimination, but it applies also to claims of discrimination based on race, religion, ethnicity, age or disability. White, who in the summer of 1997 was the only woman on a Burlington Northern & Santa Fe maintenance crew in Memphis,

Tenn. After a few months, she told her supervisor that her foreman was making sexist comments and off-color jokes – along with remarks, echoed by other workers, that a woman did not belong there.

The foreman was suspended for 10 days, but the supervisor also removed White from the forklift and reassigned her to a track crew at the same pay. She called the Equal Employment Opportunity Commission.

A jury ruled against her on her complaint of sex discrimination. But it ordered the railroad to pay her $43,000 in damages for the retaliation.

In their appeal to the Supreme Court, lawyers for the railroad noted that in 2004 alone, more than 20,000 discrimination claims citing retaliation had been filed. They argued in vain, that claims should be restricted to major actions, such as a firing or demotion.

In other decisions Thursday, the justices:

• Ruled 7-2 that defendants, not prosecutors, have the burden of proving in federal trials that they had committed a crime under duress.

• Said in a 6-3 ruling that a California inmate had to go through a prison grievance system before bringing a suit claiming he had been wrongly punished.